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

INTERIM ORDER P-1620

Appeal P_9800041

Ministry of the Attorney General and the Ontario Native Affairs Secretariat

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) and the Ontario Native Affairs Secretariat (ONAS) received a request under the Freedom of Information and Protection Act (the Act) for access to the following records:

(i) All minutes taken by any and all individuals in attendance at the Inter-ministerial Committee for Aboriginal Emergencies meetings from September 3, 1995 to October 1, 1995, inclusive.

(ii) All documents, including electronic documents, created by any and all individuals in attendance at the Inter-ministerial Committee for Aboriginal Emergencies meetings from September 3, 1995 to October 1, 1995.

(iii) All minutes taken by any and all individuals in attendance at the meetings of the Core Working Group of the Ipperwash Incident Crisis Communications Procedures Group from September 3, 1995 to October 1, 1995.

(iv) All documents, including electronic documents, created by any and all individuals in attendance at the meetings of the Core Working Group of the Ipperwash Incident Crisis Communications Procedures Group from September 3, 1995 to October 1, 1995.

The Ministry represented both itself and ONAS throughout the request and appeal stages of this matter.

The Ministry located 558 pages of records and granted access in full to 246 pages, partial access to 142 pages, and denied access in full to the remaining 170 pages of records. For those records to which access was denied, either in whole or part, the Ministry claimed the application of the following exemptions contained in the Act:

- Cabinet records - section 12
- advice or recommendations - section 13
- law enforcement - section 14
- relations with other governments - section 15
- valuable government information/economic and other interests - section 18
- solicitor-client privilege - section 19
- danger to safety or health - section 20
- invasion of privacy - section 21

The requester (now the appellant) appealed the Ministry's decision, and claimed that the Ministry's decision letter failed to meet the requirements of section 29 of the Act.

The records at issue in this appeal consist of meeting notes and agendas, handwritten notes, briefing notes, issue notes, background notes, "talking points", "updates", "chronologies", "options", recommendations, memoranda, e-mail communications, policy frameworks, "plans", "strategies", communications materials, and various other related documents and drafts.

As part of mediation, the appellant agreed that he would not pursue access to Records 8, 9, 244-246, 251-253, 258-260 and 300. He also claimed that there is a compelling public interest in the disclosure of the remaining records pursuant to section 23 of the Act.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only.

Subsequent to the issuance of the Notice, the Ministry informed the Mediator that there were 279 pages of additional records responsive to the request, all of which were denied in their entirety. The Ministry forwarded a copy of these additional records to this office and, because there were no new exemption claims or issues raised, I have decided to include them in this inquiry.

In its representations, the Ministry stated that it was withdrawing the application of section 19 to part of Record 47AH and all of Records 415-416, 480, 613, 629-630 and 634. Because section 19 was the only exemption claimed for Records 415-416, 480, 613, 629-630 and 634, and no mandatory exemptions apply to them, they should be disclosed to the appellant. The Ministry also stated that section 14 of the Act is no longer at issue because the records for which this exemption was claimed (245, 252 and 259) are among the records no longer requested by the appellant. Section 20 is also removed from the scope of this inquiry since it has not been claimed for any of the records which remain at issue.

PRELIMINARY MATTERS:

Adequacy of the Ministry's decision letter

In his letter of appeal, the appellant complained that the Ministry's decision letter failed to meet the requirements of section 29 of the Act. Specifically, the appellant objected to the fact that the decision did not include a general description of the withheld records and did not explain why the exemptions applied to the records. This issue was not raised in the Notice of Inquiry and the appellant has not referred to it further in his representations.

The Notice describes the records, explains the exemptions which have been relied on, and the onus requirements under the Act. In addition, although the Ministry's decision letter did not identify specific subsections for individual exemption claims, the severed records disclosed to the appellant include subsection references for the withheld portions. In my view, despite the inadequacies of the Ministry's decision letter, through the actions of this office the appellant was provided with sufficient information to enable him to address the issues in this appeal.

This is not the first instance where the Commissioner's office has had to address the issue of the inadequacy of this particular Ministry's decision letters. Despite strong statements made in previous orders, the Ministry has again issued what amounts to an inadequate decision letter in this appeal. This is an unacceptable pattern of conduct on the part of the Ministry. Sections

29(1)(b)(i) and (ii) of the Act clearly outline the Ministry's responsibilities in responding to access requests. These sections require the Ministry to outline "the specific provision of this Act under which access is refused" and "the reasons the provision applies to the record". To simply quote the section reference and restate the wording of the exemption is not sufficient. Requesters are entitled to know the reasons why a request has been denied so, among other things, they are in a position to decide whether or not to appeal.

Institutions and the Commissioner's office both have clearly articulated roles to play in administering Ontario's freedom of information scheme, and it is vital that both discharge their statutory responsibilities properly. When institutions do not comply with the requirements of section 29 of the Act, the Commissioner's office must step in and make up for these deficiencies during mediation. This invariably adds time to the process, at the expense of the appellant, who is entitled to a prompt and comprehensive decision. I encourage the Ministry in the strongest terms possible to adhere to its statutory responsibilities under section 29 when responding to requests in respect of which access is denied.

Late Raising of discretionary exemptions

When the appeal was first received, this office provided the Ministry with a Confirmation of Appeal, indicating that it had 35 days from the date of the Notice to raise additional discretionary exemptions not claimed in its original decision letter. No additional exemptions were raised during this period.

In its representations, the Ministry states that it inadvertently failed to claim sections 13(1), 15(a) and 18(1)(e) for Record 635-637. The Ministry submits that these exemptions were claimed for Record 638-642 which contain essentially the same information as Record 635-637 and, therefore, it is appropriate in these circumstances to consider the same claim for these records. The Ministry also raised sections 15(a) and (b) for the first time as additional discretionary exemptions for Record 654.

Because of the way in which I will be disposing of the issues in this appeal, it is not necessary for me to address the issue of the late raising of the discretionary exemption claims by the Ministry with respect to these records.

Responsiveness of the records

In its representations, the Ministry claims Records 638-642 and 643-647 fall outside the scope of the request because they contain information about factors that can lead to increased tension with Aboriginal communities and land claim negotiations concerning locations in the province other than Ipperwash. The Ministry argues that this information does not relate directly to the occupation of Ipperwash Provincial Park and submits, therefore, that these records are not reasonably related to the request.

The issue of responsiveness of records was canvassed in detail by former Adjudicator Anita Fineberg in Order P-880. That order dealt with a redetermination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3rd) 197.

In the Fineberg case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, Adjudicator Fineberg stated as follows:

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

I agree with these conclusions and adopt them for the purposes of this appeal.

While the information in Records 638-642 and 643-647 may not be directly related to Ipperwash Provincial Park, having reviewed these records, it is clear to me that they were created as a result of discussions involving the Ipperwash incident. As such, I find that they are reasonably related to the request and, therefore, responsive.

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.

Section 19 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of two 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.

[Order 49]

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 P-1342]

RECORDS WHICH HAVE BEEN THE SUBJECT OF PREVIOUS ORDERS

In its representations, the Ministry states that Records 1-3, 5-7, 12-13, 18-21, 22, 23-26, 28-31, 33, 34-37, 38, 40, 41-42, 43, 46A-46C, 65-66, 69-70, 494-500, 501, 502-511, 512, 513-514, 525-532, 534-541, 543-544, 553-558 and 559-563 were dealt with in Order P-1409; and that Records 47B, 47C, 47E, 47F and 47G-47L were dealt with in Order P-1578. In order P-1409, Branch 2 of the section 19 exemption was upheld for either all or portions of the records which correspond to Records 1-3, 5-7, 19-21, 22, 23-26, 28-31, 34-37, 40, 41-42 (in part), 46A-46C, 494-449, 502-511, 512, 513-514, 525-532, 534-541, 543-544, 553-558 and 559-563. In Order P-1578, the same exemption was upheld for the records which correspond to Records 47B, 47C, 47E, 47F and 47G-47L. The information severed from Record 18 was found not to be responsive to the request in P-1409, and Records 12-13, 33, 38, 41-42 (in part), 65-66 and 69-70 were outside the scope of Order P-1409 because the appellant in that case had agreed not to pursue "personal information", which was the only withheld information contained in those records.

In its representations, the Ministry submits that since these records have been the subject of previous adjudications, they should be treated in the same manner in this appeal.

There may be circumstances where this office should not rely on previous decisions in deciding similar matters, due to the passage of time or a change in circumstances or context. However, in

my view, this appeal does not fit into this category. The nature of the exemption under consideration, solicitor-client communication privilege, is not time-sensitive, nor is it impacted by the termination of litigation. In the circumstances of this appeal, I have concluded that Records 1-3, 5-7, 19-21, 22, 23-26, 28-31, 34-37, 40, 41-42 (in part), 43, 46A-46C, 494-499, 502-511, 512, 513-514, 525-532, 534-541, 543-544, 553-558 and 559-563, and Records 47B, 47C, 47E, 47F and 47G-47L continue to qualify for exemption under section 19, for the same reasons as articulated in Orders P-1409 and/or P-1578.

However, this is not the case for Records 12-13, 33, 38, 41-42 (in part), 65-66, 69-70, 500 and 501. Records 500 and 501 were not records at issue in Order P-1409. As previously noted, Records 12-13, 33, 38, 41-42 (in part), 65-66, 69-70 were removed from the scope of that appeal, with the agreement of that appellant, prior to the issuance of Order P-1409. Accordingly, Records 12-13, 33, 38, 41-42 (in part), 65-66, 69-70, 500 and 501 remain at issue in this appeal and will be considered in the section 19 discussion that follows.

With reference to the appellant's claim that there is a compelling public interest in disclosure of the records, the public interest override provided by section 23 of the Act does not apply to records which qualify for exemption under section 19.

LITIGATION PRIVILEGE

In Order P-1551, Adjudicator Holly Big Canoe discussed the scope of litigation privilege and its underlying principles. As a result of her analysis, she found that certain records for which the Branch 2 section 19 exemption had been claimed no longer qualified because litigation had terminated and any privilege attached to these records was lost as a result. Order P-1551 was issued during the course of the present appeal, and the parties did not have the benefit of Adjudicator Big Canoe's reasoning in responding to the Notice of Inquiry.

Having reviewed the records, in my view, the issue of whether litigation privilege which may have been enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation or the termination of litigation is relevant with respect to certain records at issue in this appeal. I have decided that the parties should be given the opportunity to provide representations on this issue before I make my determination on these records, and a Supplementary Notice of Inquiry will be sent to the parties coincidental with the issuance of this order. The records for which the Ministry has only claimed "litigation privilege" are 59-59B, 188A-188B, 194-195, 471-478, 516, 545-547, 591-595, 596-601, 602-604, 605-612, 614, 615-622 and 655.

In order to avoid delay for records which do not fall within this category, I have decided to dispose of other issues in this interim order.

SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (see Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... 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 overall 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.
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> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

In its representations under section 19, the Ministry has divided the records for which this exemption has been claimed into several categories. I will use these categories in my discussion.

Memoranda from counsel to counsel - Records 426-427, 548-552, 568-570, 571-575, 576-578, 623-627 and 677-678

The Ministry submits that these are all memoranda that were prepared by Crown counsel for the purposes of giving legal advice.

I accept that these records were prepared by Crown counsel.

Record 426-427 is a memorandum providing information regarding outstanding litigation and possible legal action regarding land claim issues. Records 548-552 (571-575 and 623-627 are duplicates), 568-570 (576-578 are duplicates) and 677-678 are all communications in which advice, direction and/or information is being provided relating to interpretations of various provisions of the Cemeteries Act.

In my view, all of the information contained in these records was prepared for the purpose of permitting Crown counsel to report to their clients on the issues surrounding the occupation of Ipperwash. I find that they were prepared "for use in giving legal advice", and that these records qualify for exemption pursuant to section 19.

Memoranda from counsel to clients conveying advice - Records 405-412, 413 and 414

Record 413 (414 is a draft of the same document) is a memorandum from counsel for the Ministry of the Solicitor General and Correctional Services (MSGCS) to the Deputy Minister for that Ministry, and Record 405-412 is a memorandum from counsel with the Legal Services Branch at MSGCS to the Special Advisor for the Deputy Minister for that Ministry. These records contain legal advice and opinion relating to the authority and obligations of the Ontario Provincial Police (the OPP) in respect of the situation at Ipperwash Provincial Park. Clearly, these records represent confidential communications between solicitor and client and are, therefore, exempt under section 19.

E-mails - Records 63A-63C, 159A, 452, 467, 515, 542, 631, 633 and 660-661. Transcription of voice mail messages - Records 657 and 658-659

Record 159A (631 is a duplicate) is a communication from counsel at the Ministry of Natural Resources (MNR) to counsel at ONAS and the Ministry. The information contained in these records relates to the interpretation and the providing of direction respecting an endorsement on an injunction application being considered by the Ministry. Records 452 and 660-661 are e-mails from counsel at ONAS to the Acting Legal Director for ONAS providing advice about the involvement of the federal government in the Ipperwash occupation and the content of a message updating the situation at Ipperwash Provincial Park. Record 633 is an e-mail from another counsel at ONAS to the Acting Legal Director regarding interpretations of the Cemeteries Act. Records 467 and 515 (542 is a duplicate with the addition of a handwritten note) are e-mails from the Acting Legal Director to the Acting Assistant Secretary, Land Claims and Self Government Negotiations, providing information related to the existence of a burial ground and an update of certain issues respecting the Ipperwash occupation. Records 63A, 63B and 63C are communications between Ministry of Transportation (MOT) counsel and an MOT employee respecting direction and advice regarding potential road claims.

Records 657 and 658-659 are also duplicates of each other. They consist of a transcribed voice mail message from senior counsel at ONAS to the various members of the Interministerial Support Group, in which counsel provides an update of the developments at Ipperwash Provincial Park.

All of these records concern Ipperwash related issues, and the Ministry submits that the purpose of these communications was not only to relay information amongst counsel and provide advice to the Interministerial Group, but to also allow counsel to provide advice within their respective Ministries.

All of the individuals sending or receiving these e-mail records were either employees of the provincial Crown or Crown counsel acting in their official capacity to assist the government in formulating a response to the situation at Ipperwash Provincial Park. Accordingly, I find that these records were prepared for the purposes of obtaining legal advice and qualify for exemption under section 19.

Briefing notes - Records 52, 52A, 54, 55, 56, 57, 58, 60-62C, 101-103C, 205-206, 208-209 and 583-588

I will be dealing with Records 60-62C (101-103C and 583-588) under the discussion of section 12 (Cabinet Records) and, therefore, I will not consider them here.

There are several duplicate records in this category. Record 52 (52A, 54, 55, 56, 57 and 58 are duplicates) is a draft of a briefing note dated September 5, 1995; Record 205-206 is a draft briefing note dated September 12, 1995; and Record 208-209 is a draft briefing note dated September 13, 1995. All of these records have been partially disclosed to the appellant. The Ministry submits that the records were all prepared by senior counsel at ONAS, and that the withheld information is legal advice that was provided to the Minister Responsible for Native Affairs on a confidential basis.

I accept the Ministry's characterization of the undisclosed information in these records. It consists of confidential legal opinions and/or advice, and provides the Minister with options regarding possible actions and responses respecting the situation at Ipperwash Provincial Park. In my view, this information falls squarely within the category of legal advice, and these records qualify for exemption under section 19.

Counsel's working notes - Records 44, 44A, 44AA, 45, 47, 47A, 47D, 47M-47Z, 47AA-47AG, 47AI-47AZ, 48, 48AA-48AB, 48A, 49A-49U, 424, 425, 432-436, 437-439, 446-449, 481-482, 483, 500, 501, 533, 564, 565-567, 628, 632, 635-637, 651, 652-653, 654, 662 and 679-683

The Ministry states that these records are all hand-written notes created by ONAS and Ministry counsel, as well as an ONAS articling student. According to the Ministry, these notes were made between September 3 to October 1, 1995, and all relate to the occupation of Ipperwash Provincial Park. The Ministry submits that these notes were made in order to assist counsel in recalling information at a later date if called upon to provide legal advice by counsel to themselves, as well as notes of relevant information obtained during meetings and, therefore, they qualify for exemption under section 19.

I find that all of these records are handwritten notes, and I accept that they were prepared by counsel. In Order P-1409, former Adjudicator John Higgins found that handwritten notes are often prepared for use in giving legal advice at a later time, and if this is established, they qualify

for exemption under section 19. In my view, in order to fit within this category there must be an established relationship between the notes and their potential subsequent use in providing legal advise, either from the contents of the notes themselves or through representations provided by the Ministry. As far as the handwritten notes in this appeal are concerned, I find that the Ministry has established a relationship between these notes and their potential subsequent use in providing legal advice, and I find that they qualify for exemption under section 19.

Action Lists and Support Group Agendas - Records 219, 290, 292, 294, 301, 302 and 280, 282, 285, 288-289, 317-317A, 319 and 663

The Ministry states that Action Lists were created by the Interministerial Support Group in lieu of minutes. Records 290, 292, 294 and 301 are identical to each other, with the exception of some handwritten notes on Records 294 and 301. Record 219 is also an Action List. Record 302 is the second page of an Action List (Record 301) with one handwritten note. These records have been partially disclosed to the appellant.

Records 280, 282, 285, 288-289, 317-317A, 319 and 663 are Support Group Agendas. These records have been disclosed to the appellant with the exception of the handwritten notes made on the records.

The Ministry submits that the undisclosed typewritten portions of the Action Lists relate to the possibility of further action by the government and were prepared by Crown counsel for use in giving confidential legal advice regarding the further action.

Based on the content of the records and the representations provided by the Ministry, I am persuaded that the severed information in these records was prepared for use in giving confidential legal advice. Therefore, I find that the undisclosed typewritten portions of the Action Lists qualify for exemption under section 19.

With respect to the handwritten notes that appear on all of these records, I accept the Ministry's position that they were prepared for use in giving confidential legal advice at a later time and, therefore, qualify for exemption under section 19 for the same reasons as outlined in my discussion of the previous category of records (counsel's working notes).

Project Management Plan - Records 664-665, 666-668, 669-672 and 673-676

The Ministry states that these records are draft "Project Management Plans" prepared by ONAS Crown counsel.

The Ministry submits that these plans were prepared for the purpose of or for use in giving legal advice to the government regarding the occupation of Ipperwash Provincial Park. The Ministry points out that a large part of the Interministerial Group's responsibility was to provide legal advice.

Based on the Ministry's representations and my independent review of these records, I find that the provision of confidential legal advice was one of the primary purposes of this project

management plan, and that its disclosure would reveal the nature of that advice. Therefore, I find that all records in this category qualify for exemption under section 19.

Aboriginal Emergencies Preparedness Plan - Records 80A-80C, 82K-82M, 94A-94C, 579-580, 581-582 and 589-590

Records 579-580, 581-582 and 589-590 are basically identical. The Ministry explains that these records were also created by ONAS' counsel and represent "her thoughts on dealing with the emergency in the Ipperwash Provincial Park". The Ministry submits that they were prepared by Crown counsel to assist her in providing legal advice at a later date.

In my view, although these records do not represent a direct communication between a solicitor and a client, I find that their disclosure would reveal confidential legal advice, and therefore they qualify for exemption under section 19.

Records 80A-80C, 82K-82M and 94A-94C are also identical parts of the same document titled "Managing Aboriginal Relations with Respect to the Ipperwash Provincial Park Occupation". The first two pages of this document have been disclosed to the appellant. The Ministry states that this document was prepared by the Interministerial Group, which included Crown counsel, to provide information to the relevant Deputy Ministers and other government staff. In the Ministry's view, the various options and recommendations contained in the document are predominantly legal advice, and those portions that are non-legal advice cannot be reasonably separated out from the legal portions.

Having carefully reviewed the document, I find that, although it is not a direct communication between a solicitor and a client, the information contained in the document is predominantly confidential legal advice, and disclosure of the withheld portions of this document would reveal this legal advice. Accordingly, I find that Records 80A-80C, 82K-82M and 94A-94C qualify for exemption under section 19.

"Potential Hot Spots" - Records 78A-78E, 82D-82H, 91A-91E, 638-642 and 643-647

Records 78A-78E, 82D-82H and 91A-91E are identical to one another, as are Records 638-642 and 643-647. The Ministry submits that these documents were prepared by Crown counsel for the purposes of providing legal advice to the government with respect to areas of the province where potential emergencies could arise in response to the situation at Ipperwash Provincial Park.

These records were prepared by Crown counsel, and are clearly for use in giving confidential legal advice. Therefore, I find that they qualify for exemption under section 19.

Managing Aboriginal Relations after Ipperwash - Records 335, 336, 337, 338 and 339

These records are identical to each other with the exception of some handwritten notes. They have been partially disclosed to the appellant with severances under the heading "Key Messages". The Ministry submits that certain severed information represents confidential written communication between Crown counsel, the Attorney General and Deputy Minister

responsible for ONAS. According to the Ministry, this information consists of legal advice as to what may be conveyed as a key message by either the Attorney General or the Deputy Minister. The Ministry submits that the hand written notes also represent legal advice.

I accept the Ministry's submission that certain severed information in these records contain legal advice provided by Crown counsel with respect to the content of the "key message" to be delivered by either the Attorney General or the Deputy Minister responsible for ONAS. As such, I find that the undisclosed portions of these records for which section 19 has been claimed, including the handwritten notes, qualify for exemption under this section.

Other information has been severed from Records 337, 338 and 339 on the basis that it qualifies for exemption under section 21 of the Act. The portions of these records that contain telephone numbers have been removed from the scope of this appeal. The remaining severances in this category will be considered in my discussion of the personal information exemption claim later in this order.

Post Crisis Strategy - Records 173, 175 and 180

These records are duplicates of each other. The Ministry submits that they address the issue of how to position Ontario to manage Aboriginal relations following the Ipperwash incident. The Ministry argues that the handwritten notes which appear on these records were made by ONAS' counsel and are, therefore, exempt under section 19.

For the same reasons articulated for the previous category of records, I find that the handwritten notes represent legal advice and qualify for exemption under section 19.

Overview of Aboriginal Legal Issues - Records 518-524

The Ministry submits that these records, which comprise a single document, were prepared by Crown counsel for use in giving legal advice to the Deputy Ministers. As with several of the other records which I have already discussed, although these records are not a direct communication between a solicitor and a client, they form the basis for the formulation of confidential legal advice, and I find that they qualify for exemption under section 19.

Other records

Because I will be dealing with Records 440-441, 442-443, 444-445, 450-451, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 468-469 and 484-485 under the discussion of section 15 (relations with other governments) and Record 176A under the personal information exemption claim (section 21), I will not consider them here.

There are several other records remaining at issue for which the Ministry has claimed section 19. Although the Ministry has discussed them under several separate categories, because there are only a few records in each category, I have decided to deal with them together under this heading.

Records 347-347C (356-359, 360-363, 364-367, 368-372, 373-376 are duplicates of one another with handwritten notes on some); Records 421-423 (648-650 are duplicates); and Records 488-489 (490-491 and 492-493 are duplicates) are all drafts of various documents dealing with issues evolving from the Ipperwash occupation, such as burial sites, overall strategies and the possible involvement of a neutral facilitator. In each case, the Ministry submits that the drafts represent confidential written communications from Crown counsel to either the Deputy Ministers or other government officials relating to the content of the documents and recommended courses of action.

Given the nature of these records and the circumstances under which they were created, I am satisfied that they reflect confidential written communications between Crown counsel and their government clients which were created for the purpose of seeking, formulating or giving of legal advice. Therefore, I find that Records 347-347C, 356-359, 360-363, 364-367, 368-372, 373-376, 421-423, 488-489, 490-491, 492-493 and 648-650 all qualify for exemption under section 19.

Only the handwritten notes that appear on Records 47AH, 177, 380, 381, 382, 354A, 354B, and 479-480 have been exempted under section 19. Both the typewritten and handwritten portions of Record 470 are subject to this exemption claim. Records 177, 380, 381 and 382 have been partially disclosed to the appellant. As noted earlier, the Ministry has withdrawn the section 19 exemption claim for all of Record 480 and the typewritten portion of Record 47AH. In addition, the Ministry has also withdrawn this exemption claim for all but the handwritten notes that appear on Record 479.

With respect to Records 47AH, 177, 380-381, 382, 354A-354B, 470 and 479, the Ministry submits that the handwritten notes were made by Crown counsel, and represent either their thoughts or views gathered at that time for the purposes of providing legal advice at a later date or, for the explicit purpose of providing legal advice in the notes themselves. I find that the handwritten notes which appear on these records either relate directly to the giving of confidential legal advice or would reveal the nature of the advice to be given. Therefore, they qualify for exemption under section 19.

The typewritten portions of Record 47AH, however, have also been exempted under sections 15 and 21 of the Act. I will consider this information in my subsequent discussion of these exemptions.

Because no other discretionary exemptions have been claimed for the typewritten portion of Record 479-480, and no mandatory exemptions apply, it should be disclosed to the appellant with the handwritten notes severed.

Record 16 is part of a three-page document (Records 15-17). All parts of this document have been disclosed to the appellant, with the exception of three lines severed from Record 16. The Ministry explains that this document represents notes taken by the Director of Communications at ONAS, a non-lawyer, during a meeting of the Interministerial Committee. The Ministry submits that the severed information relates to a part of the meeting in which various legal options were being discussed with Crown counsel, and are directly related to the seeking, formulating and giving of this confidential legal advice. Given the nature of this document and the circumstances under which it was created, I am satisfied that one of the purposes of this

meeting was to obtain legal advice, and that the severed portions would reveal confidential legal advise sought or given by the individuals attending the meeting, all of whom 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 Ipperwash Provincial Park. Any privilege which might arise in connection with discussions that took place would not be lost because of the presence of non-lawyers at the meeting (see Order P-1412). Therefore, I find that the withheld portions of Record 16 qualifies for exemption under section 19.

The Ministry explains that Record 417-420 contains a summary of litigation involving other ongoing Aboriginal land claims active at that time. The Ministry submits that these records were prepared by Crown counsel and were used to assist the Interministerial Support Group in seeking, formulating or giving legal advice regarding the Ipperwash occupation. Once again, given the nature of the information contained in these records and the context in which they were created and communicated, I find they relate directly to the formulation and giving of legal advice on matters relating to the Ipperwash occupation, and therefore, Record 417-420 qualifies for exemption under section 19.

Record 656 is a FAX cover sheet. The Ministry submits that, although the FAX cover sheet does not itself contain any confidential information, it could be deduced that the attachment to the cover sheet covered confidential information to be passed from counsel to counsel. Therefore, the Ministry argues, it is a written communication between counsel that was directly related to seeking, formulating or giving legal advice and should qualify for exemption under section 19. The gist of the Ministry's submission is that because the FAX cover sheet was attached to a record qualifies for solicitor-client privilege, the FAX cover sheet itself should acquire the same privileged status. I do not accept the Ministry's position. The cover sheet only identifies the sender and the recipient, and, by the Ministry's own admission, does not contain any confidential information. In my view, there is nothing in this record that indicates that it was used for the seeking, formulating or giving of legal advice and the Ministry's representations do not convince me otherwise. Therefore, I find that Record 656 does not qualify for exemption under section 19.

Finally, the Ministry's document control list indicates that Record 517 was also exempted under section 19, although the Ministry has provided no representations on this record. Record 517 is a different FAX cover sheet, which includes the sender and the recipient and a very brief reference to the attached document. For the same reasons as my decision on Record 656, I find that there is nothing on the face of Record 517 to indicate that it was used for the seeking, formulating or giving of confidential legal advice, and this record does not qualify for exemption under section 19.

Because no other discretionary exemptions have been claimed for Records 656 and 517, and no mandatory exemptions apply, they should be disclosed to the appellant.

CABINET RECORDS

The Ministry claims that the information severed from Records 60-62C (101-103C and 583-588 are duplicates) and Record 174 (180A is a duplicate) is exempt from disclosure under the introductory wording of section 12(1) of the Act. Section 12(1)(b) is also relied on by the Ministry with respect to Record 60-62C. This section states:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

The Ministry explains that Record 60-62C is a briefing note, with an attachment. The severed portions of the briefing note summarize the Cabinet approved procedures for dealing with Aboriginal emergencies, and the attachment, which has been withheld in its entirety, is the procedures themselves. The Ministry submits that disclosure of these documents would reveal the substance of Cabinet deliberations because the procedures are essentially the same as those submitted to Cabinet and the severed portions of the briefing note simply describe the procedures. The Ministry states that the procedures contain policy options or recommendations which were submitted to and approved by Cabinet in a slightly modified form. In the Ministry's view, even though there were minor revisions made to this record before it was presented to Cabinet, it still meets the requirements for exemption under section 12(1)(b).

Having reviewed Record 60-62C, I am satisfied that the procedures attached to the briefing note reflect the guidelines that were actually presented and approved by Cabinet, and that they qualify for exemption under section 12(1)(b). I also find that the undisclosed parts of the briefing note are restatements of certain portions of those guidelines, and are similarly exempt under this section.

As far as Record 174 is concerned, the Ministry states that it contains proposed elements and issues to be addressed in an Aboriginal Policy Framework which was used to govern Ontario's approach to Aboriginal relations. The Ministry explains that the record proposed key issues and, based on the elements set out in the record, an Aboriginal Policy Framework was prepared and submitted to Cabinet's Policies and Priorities Committee and eventually approved by Cabinet. This framework was made public in March 1996. The Ministry argues that Record 174 would reveal the substance of deliberations of Cabinet, since it indicates the matters to be considered in preparing the framework and suggests priorities and key issues to be addressed. The Ministry submits that the record would both reveal the deliberations of cabinet and permit the drawing of accurate inferences regarding the substance of these deliberations.

In my view, the Ministry has established that disclosure of this record would reveal the substance of deliberations of Cabinet and, therefore, it is properly exempt under the introductory wording to section 12(1).

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.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or 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. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

The records remaining at issue for which the Ministry has claimed exemption under section 13(1), either in whole or in part, are: Records 164-167, 168-169, 170-171, 172, 173, 175, 180, 378, 388, 388A-388B, 389, 391, 395, 404, 428-429 and 486-487. The Ministry also claimed this exemption for Record 453-464 but, as I indicated earlier, I will be dealing with this record in my discussion of section 15.

The Ministry has provided me with extensive background information regarding the nature of government deliberations in responding to the emergency situation at Ipperwash and the context within which advice was given. The Ministry has also provided detailed representations on the application of section 13(1) to each of the records for which it is claimed.

Records 164-167, 168-169, 170-171, 172, 173 (in part), 175 (in part), 180 (in part), 378, 388, 388A-388B, 389, 391, 395 and 486-487, some of which have been partially disclosed to the appellant, are drafts of various documents, all of which deal with the government's response and actions before, during and after the occupation of Ipperwash Provincial Park. The Ministry submits that the undisclosed portions of these records provide advice on the issue of how to position Ontario to manage Aboriginal relations following the Ipperwash incident, as well as advice and recommendations regarding the content of the final versions of these various documents. Although these records are not in the from of advice or recommendations, in my view, these drafts would reveal the advice or recommendations of a public servant as to their content and the action to be taken. In my view, the advice and recommendations formed an integral part of the deliberative process of government decision-making regarding the Ipperwash occupation, which relates directly to the actual business of the Ministry (see Orders P-94 and P-434). Accordingly, I find that these records qualify for exemption under section 13(1).

The Ministry explains that Record 404, which is a typewritten note, provides advice on desired outcomes with respect to the resolution of the Ipperwash occupation and the proposed steps to achieve those outcomes. The Ministry submits that disclosure of the record would reveal the advice or recommendations provided on these courses of action. In my view, disclosure of this record would clearly reveal advice and/or recommendations of a public servant which may be accepted or rejected by its recipient. Therefore, I find that it also qualifies for exemption under section 13(1) of the Act.

Finally, Record 428-429 consists of two pages of handwritten notes. The Ministry states that the notes reflect proposed messages with respect to relations with the federal government, the approach to the existence of a burial site within the Park and its relationship to a land claim. The Ministry submits that disclosure of the proposed messages would reveal advice with respect to a suggested course of action. The notes set out some of the various issues which arose during the Ipperwash occupation, and the government's reaction and response to those issues. However, in my view, they contain factual information about these issues and do not contain nor would they reveal advice or recommendations. Therefore, I find that Record 428-429 does not qualify for exemption under section 13(1).

Because no other discretionary exemptions have been claimed for Record 429, and no mandatory exemptions apply, it should be disclosed to the appellant. The Ministry has also claimed the section 15 exemption for one portion of Record 428, and this claim will be addressed in the discussion that follows.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims sections 15(a) and (b) as the basis for refusing to disclose all withheld portions of Records 85, 121, 128, 129, 202, 430-431, 440-441, 442-443, 444-445, 450-451, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 465-466, 468-469, 484-485 and 485A-485B, as well as certain portions of Records 47AH and 428. These records consist of correspondence between the Ministry and the federal government in draft and final form, internal documents noting the conduct of communication between the Ministry and the federal government, and various other documents that reflect the nature of the relations between the Ministry and the federal government regarding the Ipperwash occupation and land claim issues.

Sections 15(a) and (b) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;

Section 15(a)

In order for a record to qualify for exemption under section 15(a), the Ministry must establish that:

1. the relations must be intergovernmental, that is relations between the Ministry and another government or its agencies; and

2. the disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

[Order P-908]

Part One

The Ministry states that the withheld information reveals or reflects the interactions and discussions of a sensitive and confidential nature that occurred between government officials from Ontario and Canada concerning the occupation of Ipperwash Provincial Park. The Ministry argues that discussions between the provincial and federal governments which relate to their respective involvement and positions concerning a First Nation matter concern intergovernmental relations of significant importance.

I accept these submissions and I find that the first part of the section 15(a) test has been established.

Part Two

The Ministry also submits that the free flow of information between the governments on such issues is necessary, and that confidentiality is essential to create and maintain these relations. According to the Ministry, any breach of this expectation of confidentiality by any of the parties or through the appeal process would have a serious chilling effect upon the open and free conduct of the flow of information and would thereby prejudice the conduct of these intergovernmental relations.

Given the sensitive and complex nature of the issues surrounding the occupation of Ipperwash Provincial Park, including the need for ongoing communications regarding this and other related matters, I am persuaded that disclosure of the severed information could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada.

Therefore, I find that the parts of the records to which section 15(a) has been applied, either in whole or in part, qualify for exemption under section 15(a). Only those portions of Records 47AH and 428 which qualify for exemption under section 15(a) should not be disclosed. The remaining undisclosed portions of these records do not qualify for any discretionary or mandatory exemption claim and should be disclosed to the appellant.

The test under section 15(a) of the Act which I described at the beginning of this discussion was previously developed by this office as the standard for determining the application of this exemption. Having considered that test and its application to the records in Order P-1406, it was my view that it would be more appropriate to restate the test as follows:

> In order for a record to qualify for exemption under section 15(a), the parties resisting disclosure must establish that:

1. the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

2. disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

While I have made my findings above in accordance with the standards of the previously articulated section 15(a) test, I have also reviewed the records in light of the restated test, and my findings under section 15(a) are the same in either case. These records relate to intergovernmental relations and their disclosure could reasonably be expected to prejudice the conduct of those relations.

Because of my findings under section 15(a), it is not necessary to consider section 15(b).

ECONOMIC AND OTHER INTERESTS

The Ministry claims that parts of Records 242-243C (249-250C and 256-257C are duplicates) are exempt under section 18(1)(f) of the Act. The Ministry states that these records represent three copies of the same document with minor differences (256-257C is dated later than the other two and its contents appear in a different order). However, other than these minor differences, their content is the same.

In order to qualify for exemption under section 18(1)(f), the Ministry must establish that:

1. the record must contain a plan or plans, **and**

2. the plan or plans must relate to:

   (i) the management of personnel or

   (ii) the administration of an institution, **and**

3. the plan or plans must not yet have been put into operation or made public.

[Order P-229]

It is important to note that these records, titled "Crisis Management Ipperwash Plan", were prepared by the Communications Branch of the Ministry of the Solicitor General and Correctional Services (MSGCS). Pursuant to sections 25(2) and (3) of the Act, the Ministry could have transferred this part of the request to MSGCS as an institution with a greater interest in these records. However, the Ministry, evidently chose not to do so, and has proceeded to treat this record as one of its responsive records. Order P-395 specifically found that the Act expressly contemplates and allows for consultations between governmental institutions before a decision relating to access to a record is made by an institution where the record affects the interest of more than one institution, and that the institution responding to the request is in a

reasonable position to present the government's position as a whole. In the circumstances of this appeal, I am satisfied that the Ministry has given full consideration to this issue in providing representations on Records 242-243C, 249-250C and 256-257C, particularly in light of the fact that the Ministry's Freedom of Information Co-ordinator performs the same function for MSGCS.

The Ministry states that the record is based on a template used by MSGCS with respect to crisis communication procedures, and that it outlines a plan for managing the Ipperwash crisis, including the goals of the process and the roles of the various persons and offices. The Ministry argues that the record specifically provides a plan for the dissemination of information by the government, with details of how the various offices within the government are to operate in the circumstances. The Ministry submits that the record is a plan which relates to both the management of personnel and the administration of an institution.

A "plan" is "a formulated and especially detailed method by which a thing is to be done; a design or scheme" (see Order P-348). Based on my review of this record and the Ministry's explanation, I accept that the record is a plan and the plan relates to the management of personnel and the administration of an institution. Therefore, I find that the first two parts of the test have been satisfied.

With respect to part three of the test, the Ministry states that the record was drawn from a template that is used on a continuing basis. The Ministry argues that disclosure of the record, as adapted to the Ipperwash emergency, would reveal in a more general and generic way the manner in which MSGCS addresses emergency situations, and this in turn may prejudice the government's ability to use this planning template in future emergency situations. The Ministry's position is that even if a plan has been utilized once, if there is an intention to put the plan into operation again in the future, then it has not been "put into operation" for the purposes of section 18(1)(f) of the Act.

I do not accept the Ministry's position. The plan, as set out in the record, has clearly been put into operation in the context of managing the Ipperwash occupation in 1995. Should a different emergency arise in future the generic template may well be used again but, in my view, a new and distinct communications crisis plan would have to be developed, one which would presumably be designed to deal with particular circumstances of the specific emergency situation. In my view, the "Crisis Management Ipperwash Plan" has, in fact, been put into operation, and the requirements for the third part of the test are not present.

Therefore, I find that Records 242-243C, 249-250C and 256-257C do not qualify for exemption under section 18(1)(f) of the Act. Because no other discretionary exemptions have been claimed for these records, and no mandatory exemptions apply, they should be disclosed to the appellant.

PERSONAL INFORMATION AND INVASION OF PRIVACY

The records remaining at issue for which section 21 of the Act has been claimed, either in whole or in part, are Records 12-13, 33, 38, 41-42, 46, 49, 50, 51, 65-66, 69-70, 158, 176-176A, 200, 337, 338, 339, 341 and 404, as well as the remaining parts of Record 47AH.

Pages 50 and 51, contain information relating to an identifiable individual whose interests may be affected by the outcome of this appeal. This individual has not been notified of this appeal and, therefore, has not been given the opportunity to provide representations regarding disclosure of this information. Accordingly, a Supplementary Notice of Inquiry will be sent to this individual, inviting him/her to comment on the issue of whether the records contain his/her personal information, and if so, whether it qualifies for exemption under section 21(1) of the Act. As a result, my decision respecting pages 50 and 51 will be deferred, along with the previously noted records for which litigation privilege has been claimed.

Section 2(1) of the Act indicates that "personal information" means recorded information about an identifiable individual, and goes on to list a number of examples of such information, which include:

> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have received in-depth and lengthy representations on this issue from the Ministry.

In Order P-1409, former Adjudicator John Higgins considered similar records and issues involving the same affected persons. He conducted a very detailed and thorough analysis of all representations received in Order P-1409, as well the records and relevant case-law in reaching his conclusions as to which information contained in the records satisfied the definition of personal information.

I have reviewed the contents of Order P-1409 and carefully considered the representations provided by the Ministry and the affected person in this appeal. I am in full and total agreement with the reasoning and conclusions reached by Adjudicator Higgins in the pervious similar appeal, and adopt them for the purposes of the personal information and invasion of privacy issues before me in the present appeal.
Therefore, I make the following findings:

- the positions held by native leaders is analogous to employment or a profession, and references to these individuals contained in Records 46 and 404 is not the personal information of these individuals (see also Orders P-157, P-270 and P-300 referred to in Order P-1409);

- the remaining information in Record 47AH consists of a list of conditions for conducting a joint investigation into the Ipperwash shooting incident. With the exception of a telephone number, this information does not

> satisfy the definition of personal information. The telephone number falls within the scope of the introductory wording of the definition of personal information in section 2(1);

- the information severed from Records 12-13, 33, 38, 41-42, 49, 65-66, 69-70, 158, 337, 338 and 339, consists of references to individuals charged with criminal offences, to an incident which led to the laying of criminal charges, and the personal identifiers of other individuals such as names and dates of birth. This information falls within the scope of paragraph (h) and the introductory wording of the definition of personal information in section 2(1);

- the information severed from Records 176-176A, 200 and 341 relates to requests made by identifiable individuals for information relating to the Ipperwash occupation, which is information about these individuals which is properly characterized as their personal information under section 2(1).

Section 21(1) of the Act is a mandatory exemption claim, which requires the Ministry to deny access to personal information unless certain circumstances listed in section 21(1) are present. The only circumstance with potential application in the circumstances of this appeal is section 21(1)(f), which provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In the absence of any representations or evidence to show that disclosure of the personal information contained in Records 12-13, 33, 38, 41-42, 47AH (the telephone number only), 49, 65-66, 69-70, 158, 176-176A, 200, 337, 338, 339 and 341 would **not** be an unjustified invasion of their personal privacy, I find that it would. The information, in my view, is highly sensitive personal information (section 21(2)(f)) which, in the absence of any evidence to the contrary, would also fail to satisfy the requirements of the section 21(1)(f) exception.

Therefore, I find that the personal information contained in these records is exempt from disclosure under section 21(1).

Because section 21(1) of the Act can only apply to personal information, I find that this exemption does not apply to the portions of Records 46 and 404, and the remaining portions of Record 47AH, for which it was claimed.

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]

Sections 12 and 19 are not subject to section 23. Therefore, the only records which qualify for consideration under section 23 are those that I have found qualify, either in whole or in part, for exemption under either sections 13(1), 15(a) or 21. Specifically, these records are:

- Records 164-167, 168-169, 170-171, 172, 173 (in part), 175 (in part), 180 (in part), 378, 388, 388A-388B, 389, 391, 395, 404, and 486-487 - section 13(1);

- Records 47AH, 85, 121, 128, 129, 202, 428, 430-431, 440-441, 442-443, 444-445, 450-451, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 465-466, 468-469, 484-485 and 485A-485B - section 15(a); and,

- Records 12-13, 33, 38, 41-42, 47AH, 49, 65-66, 69-70, 158, 176-176A, 200, 337, 338, 339 and 341- section 21.

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

The appellant has not provided representations on this or any of the other issues raised in this appeal.

The Ministry states that the majority of records to which sections 13(1) and 15(a) have been applied relate to matters after the shooting incident and focus on efforts to resolve the situation. The Ministry argues that these records would not contribute to an understanding of the events that led up to the incident, if that is the subject of the public interest. In addition, the Ministry argues that if there is a
public interest in matters which occurred after the incident, this is not a compelling public interest.

With respect to section 13(1), the Ministry submits that government employees need to be able to provide advice and recommendations freely and frankly in order to ensure that governments receive the fullest and best advice. The Ministry states that in this instance the advice and recommendations relate to efforts to manage and address the very serious and sensitive issue of the Aboriginal occupation of Ipperwash Provincial Park. Therefore, the Ministry argues, that the underlying purposes of section 13(1) are heightened in importance by the need for free and open discussion to find solutions on an urgent basis. Finally, the Ministry submits that government officials may be required to provide advice in any future serious Aboriginal emergency situations that may occur and if they believe their advice would become subject to public scrutiny, they would be seriously inhibited in their ability to fully explore options and provide advice to government officials.

With respect to section 15(a), the Ministry argues that this section is intended to ensure that, in relations with other governments, information received by Ontario is protected from disclosure in order not to prejudice these intergovernmental relations. The Ministry submits that these relations are dependent on mutual co-operation and discussion between governments to achieve common objectives. As it relates directly to the Ipperwash incident, the intergovernmental relations are the efforts to manage and address the sensitive issues regarding the occupation of Ipperwash and implications concerning other parts of the province. The Ministry reiterates that such information is provided and received in confidence and that there is a need not to prejudice these relations by disclosing such information.

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

With respect to section 21, the Ministry asserts that the purpose of section 21 is to protect the personal privacy of individuals, and that as a mandatory exemption, it requires an increased level of consideration in respect of the application of section 23.

The Ministry further argues that even if a compelling public interest exists, this interest does not clearly outweigh the purpose of the sections 13(1), 15(a) and 21 exemptions.

In Order P-241, former Commissioner 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 conducted an independent review of the records as advocated by former Commissioner Wright.

I accept without hesitation that the media and public attention to the government's handling of the Ipperwash incident reflects an ongoing public interest in the matter. However, in the absence of any representations from the appellant on the application of the public interest override in the specific context of the sections 15(a) and 21 exemption claims, I find that the requirements of section 23 of the Act are not present.

As stated earlier, section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. I have been provided with no evidence to establish a public interest in the

disclosure of the specific information I have to qualify for exemption under section 21(1), and I find that any public interest that may exist is insufficiently compelling to outweigh the purpose of the mandatory personal information exemption, in the circumstances of this appeal.

As far as section 15(a) is concerned, in my view, there is a strong and compelling public interest in ensuring the confidentiality of intergovernmental communications on issues of common interest and concern, and I am unwilling to interfere with the proper application of this exemption claim in the absence of evidence or representations that the requirements of section 23 are present.

However, I find that there is a compelling public interest in disclosure of the records which I have found to qualify for exemption under section 13(1). In reaching my conclusion, I have considered the numerous calls for a public inquiry into the Ipperwash occupation and the ever present need for public scrutiny of such matters. In addition, most information about this incident has not been disclosed and, in my view, there is a need for a minimal amount of disclosure to at least ensure a minimal amount of public scrutiny. When all of these factors are taken into consideration, this confirms an ongoing and compelling public interest in disclosure of the information which I have found qualifies for exemption under section 13(1).

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.

I have already set out the Ministry's arguments, and I agree with it's interpretation of the purpose behind the section 13(1) exemption. However, based on the Ministry's representations, I am not persuaded that public servants would be seriously inhibited in their ability to fully explore options and provide advice to government officials if the records which qualify for exemption under section 13(1) are disclosed. In my view, the public interest in the circumstances surrounding the Ipperwash incident is significant and exceptional, and recognized as such by citizens of the province, including public servants. I am not persuaded that public servants are unable to draw the distinctions between this particular event which has generated a compelling interest in the public's mind, and the normal activities of government which are reliant on their input and the confidential nature of their advice and recommendations. Although the information contained in these records falls within the section 13(1) exemption, in my view, its disclosure would not have a pervasive or long-lasting chilling effect on the provision of advice by public servants. As stated in Order P-1409, "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". As was the case in Order P-1409, I find that the circumstances of this appeal is one such specific occasion.

Accordingly, based on my finding that there exists a compelling public interest in disclosure of records relating to the Ipperwash incident, and having balanced this compelling public interest against the purpose of the section 13(1) exemption, I find that the public interest in disclosure clearly outweighs the purpose of the exemption, in the circumstances of this appeal. Therefore, I will order the Ministry to disclose Records 164-167, 168-169, 170-171, 172, 173 (in part), 175

(in part), 180 (in part), 378, 388, 388A-388B, 389, 391, 395, 404 and 486-487, which I previously found to be exempt under section 13(1).

ORDER:

1. I order the Ministry to disclose Records 46, 164-167, 168-169, 170-171, 172, 242-243C, 249-250C, 256-257C, 378, 388, 388A-388B, 389, 391, 395, 404, 415-416, 429, 480, 486-487, 517, 613, 629-630, 634 and 656 in their entirety and Records 47AH, 173, 175, 180, 428 and 479 in accordance with the highlighted copy of these records which I have attached to the Ministry's copy of this order (the highlighted portions are **not** to be disclosed) to the appellant by **November 12, 1998**, but not before **November 9, 1998**.

2. I uphold the Ministry's decision to deny access to the remainder of the records, except for those records that will be listed in the Supplementary Notices of Inquiry that will accompany this order.

3. I remain seized of this matter in order to deal with the records covered by the Supplementary Notice of Inquiry and any other matters concerning this appeal.

4. In order to verify compliance with the provisions of this Interim order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: October 7, 1998
Tom Mitchinson
Assistant Commissioner