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

INTERIM ORDER P-1619

Appeal P_9700352

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 certain records relating to the Emergency Planning for Aboriginal Issues Interministerial Committee and/or Ipperwash Provincial Park. Specifically, the request was for all handwritten notes, facsimiles, computer files and e-mail communications sent and received from September 1, 1995 to September 15, 1995 for four named individuals (named individuals 1, 2, 3 and 4). The request also included any facsimiles sent by named individual 1 to a fifth named individual on May 28, 1996.
The Ministry represented both itself and ONAS throughout the request and appeal stages of this matter.

The Ministry located approximately 1,340 pages of responsive records for named individuals 1, 2 and 3, and granted access to approximately 350 pages in whole or in part. The Ministry advised the requester that it could not locate any responsive records relating to named individual 4, and did not respond to the part of the request concerning the fifth named individual.

The Ministry denied access to the remaining records and parts of records related to named individuals 1, 2 and 3 on the basis of one or more of the following exemptions contained in the Act:

- Cabinet records - section 12(1)
- advice or recommendations - section 13(1)
- law enforcement - section 14(1)
- relations with other governments - section 15
- valuable government information/economic and other interests - section 18(1)
- 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 to deny access, and claimed that the Ministry's decision letter failed to meet the requirements of section 29 of the Act.

After the appeal was filed, the Ministry located responsive records for named individual 4 and one record relating to the fifth named individual. The Ministry issued a separate decision letter covering these records, and they will not be addressed in this order.

The Ministry divided the records into three groups and numbered them in accordance with the first initial of the last name of each of the three named individuals (e.g. C1, J1 and M1). I will be using this numbering system throughout the order.

During mediation, the appellant decided not to pursue access to records relating to the meeting minutes of September 5 and 6, 1995 (C11-13, C17-19, J28-30, J47-48, J50-51, J53-54, M1-3 and M11-12), and any telephone numbers contained in the records. Therefore, these records and all duplicate copies have been removed from the scope of the appeal. Because sections 14(1) and

20 of the Act were claimed only for certain telephone numbers, these exemptions are also no longer at issue.

Also during mediation, the appellant decided not to pursue access to any personal information which the Ministry claimed was contained in the records, and information relating to external mediation services. However, the appellant made it clear that if any records contain the views or activities of government officials, this information remained at issue. The records to which section 21 (invasion of personal privacy) was claimed, which include the telephone numbers identified in the preceding paragraph, are C14, C15, C20, C21, C38 and C55; J31, J32, J47, J48, J49, J50, J51, J53, J54, J81, J146 (in part), J163, J173, J174, J175, J176, J177, J182, J188, J197-201, J295, J313, J331 and J332; and M11, M12, M64, M65, M66, M67, M68, M70, M121-122, M127-128, M136-137, M184, M185, M186, M194, M195, M196, M204, M205, M206, M222, M253, M269, M270, M296 (in part), M297 (in part), M298 (in part) and M320. None of the withheld information in these records relates to government officials and, therefore, these records are no longer at issue in this appeal.

Finally, the appellant claimed that there is a compelling public interest in the disclosure of the records, and they should be disclosed pursuant to section 23 of the Act.

The records remaining at issue consist of briefing notes, issue notes and drafts, fact sheets, chronologies, options, recommendations, memoranda, correspondence and e-mail communications, policy frameworks and drafts, plans, procedures, guidelines, handwritten notes, legal documents, legal opinions, and handwritten notes relating to legal matters and legal research.

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

In its representations, the Ministry withdrew the section 13(1) claim for part of Record M73, and the section 19 claim for Records M380, C254, C281 and C324-326. Because section 19 was the only exemption claimed for Records C254, C281 and C324-326, and no mandatory exemptions apply to these records, they should be disclosed to the appellant. It should be noted that Record C325 is a blank page.

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 set out the specific exemptions or subsections being claimed, only the general section number, nor did it explain the reasons why the exemptions apply. 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 section 13(1) for Records J297, C209-210, C211, C212-213 and M-511-515. The information severed from Record J297 is identical to the information severed from Records J299, J300, J308, M208, M209 and M210, for which the section 13(1) exemption had been claimed; and the information severed from Records C209-210, C211, C212-213 and M-511-515 is identical to the information severed from Record J347-351, also for which section 13(1) had been claimed. The Ministry states that it was through inadvertence that it neglected to identify the section 13(1) exemption claim for the portion of Records J297, C209-210, C211, C212-213 and M511-515, and that it is appropriate in the circumstances to permit the Ministry to add this claim now.

Because section 13(1) has already been claimed for the same information in other records that, for the most part are duplicates, I agree that it is appropriate to also consider section 13(1) for Records J297, C209-210, C211, C212-213 and M511-515.

Responsiveness of the records

In its representations, the Ministry claims Records J396-400 and M58-61 fall outside the scope of the request because they contain information about land claim negotiations and other aboriginal issues concerning locations in the province other than Ipperwash. The Ministry argues that this information does not relate to either the Emergency Planning for Aboriginal Issues Interministerial Committee or Ipperwash Provincial Park, and therefore falls outside the scope of the request.

The issue of responsiveness of records was canvassed in detail by former Adjudicator Officer Anita Fineberg in Order P-880. That order dealt with a re-determination 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 J396-400 and M58-61 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

During mediation, it was revealed that Records C120-132, C-135-138, J1-9, J33-34, J39-46, J68-73 and M327A-331 were the same records which had been found to qualify for exemption under Branch 2 of section 19 in Order P-1409.

Despite this previous finding, the appellant wanted to pursue access to these records. He maintained that time had passed since Order P-1409 was issued, all related court cases have been completed, and there is a compelling public interest in the disclosure of these records. The appellant also pointed out that, while this office should consider previous decisions, it is not bound by them, and his appeal should be reviewed on its own merits.

I agree with the appellant that if the circumstances or context has changed, he should have a right to a fresh determination of the application of section 19 to these records (e.g., the termination of litigation privilege or waiver). However, if the circumstances and context remain unchanged, the Commissioner would be extremely reluctant to alter a previous determination involving the same records.

Having considered the various arguments put forward by the appellant, I have concluded that all of these records continue to qualify for exemption under section 19, for the same reasons as articulated in Order P-1409. The appellant's argument that the court cases regarding the Ipperwash matter have been completed might be relevant had these records qualified for the "litigation privilege" rather than the "communications privilege" component of section 19 in Order P-1409. Communication privilege is not time-sensitive, nor is it impacted by the termination of litigation. 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 the 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 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 C58-62, C73-75, C77-79, C87-88, C94-96, C97-99, C101-105, C106, C107, C110-111, C113, C197-205, C207, C208, C215-253A, C255-280, C282, C283, C284, C316, J10-12, J210-211, J382-389, M112-115, M147-148 and M344-379. The Supplementary Notice of Inquiry will also include other records identified subsequently in this order.

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

SOLICITOR-CLIENT COMMUNICATION PRIVILEGE

At common law, 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 groups. I will use these categories in my discussion.

Memoranda to counsel from non-lawyers containing facts and/or background information - Records C89-90, J216-289, M381-422 and M423-507

Although the Ministry claimed this exemption for Record C89-90, I find that it contains personal information of identifiable individuals, none of whom are government officials, and is therefore outside the scope of the appeal as agreed to by the appellant during mediation.

The rest of these records contain virtually identical information to each other, and consist of a memorandum from a research co-ordinator at ONAS to counsel at ONAS. The information concerns land and water contiguous to and comprising Ipperwash Provincial Park. The Ministry argues that the information provided in this material was necessary background information used by counsel to provide confidential legal advice.

The information contained in these records was compiled by a Ministry employee for Ministry counsel. The nature of the information contained in the records clearly indicates that these records were used by counsel in the formulation and provision of legal advice.

Therefore, I find that these records qualify for exemption under section 19 of the Act.

Memoranda from counsel to counsel - Records C93, C109, C209-210, C212-213, C318-322, J150-152, J301-302, J347-350, J353-354, M7-9, M149-150, M274-295, M341-343, M508-510, M511-514 and M524-614

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

I accept that these records were all prepared by Crown counsel.

Record C93 (C109 is a duplicate) is a communication giving direction with respect to a pending court action. Records M274-295 and M508-510 are communications in which historical background information is being provided regarding land use, acquisition and claims. Records C318-322 (M7-9 is a duplicate), J150-152, J209-210, C209-210, C212-213, J301-302 (M149-150 is a duplicate) J347-350, J353-354, M341-343, M-511-514 and M524-614 are all communications in which advice, direction and/or information is being provided related 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 J165 and J395

Record J165 is a memorandum from counsel for the Ministry of the Solicitor General and Correctional Services to the Deputy Minister for that Ministry. The record contains legal advice relating to the authority and obligations of the Ontario Provincial Police (the OPP) in respect of the situation at Ipperwash Provincial Park. Clearly, this record represents a confidential communication between solicitor and client and is, therefore, exempt under section 19.

The Ministry submits that Record J395 is a confidential communication from counsel at ONAS to the Deputy Minister's Office at the Ministry of the Natural Resources (MNR) for the purpose of obtaining information and direction from that Ministry in order to provide legal advice to ONAS. In my view, this record reflects efforts made by legal counsel to obtain information which would assist her in providing legal advice to her client, and therefore qualifies for exemption under section 19.

E-mails - Records C80, C81, C83-86, J36, J37, J38, J64, J153, J190, J202, J342-343, M129 and M340. Transcription of voice mail messages - Records J337-338, J339-340 and J341

Records C80, C81, J190, J202, M129 and M340 are duplicates of one another. They are a communication from counsel at 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 contemplated by the Ministry. Record J342-343 is an e-mail from counsel at ONAS to the Acting Legal Director for ONAS providing advice about the content of a message updating the situation at Ipperwash, and Record J153 is an e-mail from another counsel at ONAS to the Acting Legal Director regarding interpretations of the Cemeteries Act. Record J64 is an e-mail from the Acting Legal Director to the Acting Assistant Secretary, Land Claims and Self Government Negotiations at ONAS, providing an update of certain issues respecting the Ipperwash occupation. Record C83-C86 is a communication from counsel for MNR to a MNR employee regarding advice on the content of a draft affidavit to be sworn by the employee. Records J36, J37 and J38 are communications between Ministry of Transportation (MOT) counsel and an MOT employee respecting direction and advice regarding potential road claims.

Records J337-338, J339-340 and J341 are also duplicates of each other. They consist of a transcribed voice mail message from senior counsel at ONAS to the various members of thIe 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 also to allow counsel to provide advice within their respective Ministries.

All of the individuals sending or receiving these confidential 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 C2, C4, C6, C7, C211, J22, J23, J25, J26, J27, J134-139, J140-145, J296-297, J299, J300, J308, J351, M4, M17-22, M208, M209, M210, M214, M230 and M515

I will be dealing with Records J134-139 (J140-145 and M17-22 are duplicates) 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 C2 (C4, C6, C7, J22, J23, J25, J26, J27 and M4 are duplicates) is a draft of a briefing note dated September 5, 1995; Record J296-297 (J300 and M209 are duplicates) is a draft briefing note dated September 12, 1995; and Record J299 (J308, M208 and M210 are duplicates) is a draft briefing note dated September 13, 1995. All of these records have been partially disclosed to the appellant. Record C211 (J351 and M515 are duplicates) is a Minister's briefing note, dated September 14, 1995, and Record M214 is a draft Minister's briefing note, dated September 13, 1995 that also includes some handwritten notes. These records have been denied in their entirety. The Ministry submits that these 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.

The information severed from Record M230 amounts to two lines of notes which the Ministry submits were made by Ministry counsel. The Ministry states that these notes were made by counsel to be kept in his file for possible future use in giving legal advice. I accept that handwritten notes made by a lawyer and retained in the lawyer's file are often prepared for use in giving legal advice at a later time, if necessary (see Order P-1409). However, in my view, 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 notes on Record M230 are concerned, they do not appear on their face to be related to the seeking, formulating or giving of legal advice, nor has the Ministry established the relationship in its representations. Consequently, I find that this record does not qualify for exemption under the solicitor-client communications portion of section 19.

Because no other discretionary exemptions have been claimed for the severed portions of record M230, and no mandatory exemptions apply, they should be disclosed to the appellant.

Counsel's working notes - Records C76, C112, C114-119, C133-145, C146-149, C150-180, C181-192, C192A-195, C214, C285-315, J20-21, J22A, J59, J61, J65-66, J74, J147-148, J155-156, J178A, J290-291, J292, J311, J352, J390-394, J404-407, M337 and M338

The Ministry states that these records are all handwritten notes created by named individuals 1, 2 and 3, as well as an ONAS articling student. According to the Ministry, these notes were made between September 6 and September 15, 1995, and all relate to the occupation of Ipperwash

Provincial Park. The Ministry submits that these notes were taken in order to assist counsel in recalling information at a later date if called upon to provide legal advice and, therefore, they qualify for exemption under section 19.

Record C285-315 is not a handwritten note. It consists of draft court documents and related records. The Ministry has not explained how this record relates to others in this category, nor how this document was used in relation to the seeking, formulation or giving of legal advice. Therefore, I find that the requirements for solicitor-client communications privilege have not been established for this record. However, Record C285-315 is also subject to a claim of litigation privilege and therefore it will be considered in the context of the Supplementary Notice of Inquiry.

As far as the rest of the records in this category are concerned, I find that they are all handwritten notes, and I accept that they were prepared by counsel. I accept that the Ministry has established a relationship between these notes and their potential subsequent use in providing confidential legal advice. I agree with the findings of former Adjudicator John Higgins in Order P-1409, that notes of this nature are often prepared for use in giving legal advice at a later time. Therefore, I find that they were prepared for use in giving legal advice and qualify for exemption under section 19.

Action Lists and Support Group Agendas - Records J323, J344, J362, J364, J366, J368-369, J373, M175, M250 and M254-255

The Ministry states that Action Lists were created by the Interministerial Group in lieu of minutes. Records J362, J364, J366 and M254 are identical to each other, as are J323 and M175. Record M255 is the second page of Record M254. These records have been partially disclosed to the appellant.

Records, J344, J368-369 and M250, are meeting agendas titled Support Group Agendas. These records have been disclosed to the appellant with the exception of the handwritten notes made on the records. Record J373 is a handwritten draft of a meeting agenda which has been denied in its entirety.

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, with the exception of Record J373, 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).

Record J373 is a handwritten draft of an agenda. The Ministry has disclosed the typewritten version of meeting agendas, without any claim for exemption under section 19. Although Record J373 is a handwritten rather than a typewritten agenda, in my view, it is sufficiently similar in nature to these previously disclosed records to attract the same treatment. Therefore, I find this record was also not used in the seeking, formulating or giving of legal advice and does not qualify for exemption under section 19. I will discuss this record further in my discussion of section 13(1) of the Act.

Project Management Plan - Records J370-372, J374-377, J378-381, M516-519 and M520-523

The Ministry states that these records are draft "Project Management Plans" prepared by one of the named 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 J104-106, J122-124, J128-129, J130-131, J132-133, M15-16 and M49-51

Records J130-131, J132-133 and M15-16 are basically identical. The Ministry explains that these records were created by one of the named Crown counsel and represent "her thoughts on dealing with the emergency in the Ipperwash Provincial Park". The Ministry submits that they were prepared by this named 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 J104-106, J122-124, J128-129 and M49-51 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 record 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 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 J104-106, J122-124, J128-129 and M49-51 qualify for exemption under section 19.

"Potential Hot Spots" - Records J96-100, J115-119, J396-400, M41-46, M58-61 and M332-336

Records J96-100, J115-119, M41-46 and M332-336 are identical to one another, as are Records J396-400 and M58-61. The Ministry submits that these records were prepared by Crown counsel for the purpose 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 J146, M296, M297 and M298

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 the severed information represents confidential written communication between Crown counsel, the Attorney General and the 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 handwritten notes also represent legal advice.

I accept the Ministry's submission that these records contain confidential 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, including the handwritten notes, qualify for exemption under section 19.

Post Crisis Strategy - Records M86 and M88

Records M86 and M88 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 the record were made by one of the named individuals 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 confidential legal advice and qualify for exemption under section 19. I will consider the typewritten portions of these records in my discussion of section 13(1) of the Act.

Overview of Aboriginal Legal Issues - Records J13-19

The Ministry submits that this document was 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 this record is not a direct communication between a solicitor and a client, it forms the basis for the formulation of confidential legal advice, and I find that it qualifies for exemption under section 19.

Fax Cover Sheets - Records C57, C82, C91, C92, C100, C108, C196, C206, C317, C323, M339 and M377

The gist of the Ministry's representations with respect to these records is that since they were attached as cover sheets to records which the Ministry has argued are privileged, the FAX cover sheets are, therefore, also privileged. In the case of Records C91 and M377, the Ministry adds that the cover sheets themselves contain legal advice.

I do not accept the Ministry's position. The cover sheets, for the most part, only identify the sender and the recipient, and, in a few instances some minimal information such as a very brief reference to the attached material or the level of attention the transmission requires. The added information on Records C91 and M377 merely provides comments or direction. In my view, there is nothing in these records that indicates that they were used for the seeking, formulating or giving of legal advice and the Ministry's representations do not convince me otherwise.
Therefore, I find that none of the records in this category qualify for exemption under section 19. Because no other exemptions have been claimed for these records, and no mandatory exemptions apply, they should be disclosed in their entirety to the appellant, with the exception of Records C91 and M377. Record C91 contains some private telephone numbers which the appellant has agreed are not at issue in this appeal and should not be disclosed. Therefore, this record should be disclosed with the telephone numbers severed. The Ministry has claimed litigation privilege for Record M377, so it will be included among the records to be considered further in the context of the Supplementary Notice of Inquiry.

The Ministry's document control list indicates that Record M6 was also exempted under section 19. This record is a FAX cover sheet. The Ministry has not provided representations on the application of section 19 to this record. However, it is similar in nature to the other records in this category. Accordingly, I find it also does qualify for exemption under section 19. Because no other discretionary exemptions were claimed for Record M6, and no mandatory exemptions apply, it should be disclosed to the appellant.

WAIVER OF PRIVILEGE

The appellant submits that government officials have waived their ability to rely on solicitor-client privilege. The appellant bases his position on the fact that these officials consistently indicated in legislative debates that they decided to seek an ex parte injunction to end the occupation of Ipperwash Provincial Park on an urgent basis based on legal advice.

I agree that certain government officials, such as the Minister Responsible for Native Affairs, made public reference to a legal opinion which recommended that the government proceed to obtain an ex parte injunction. The records already disclosed to the appellant make reference to

this opinion. However, in my view, this reference does not constitute waiver of privilege as it relates to the records I have found qualify for solicitor-client communications privilege. The records I have found to qualify under section 19 contain information which pertains to legal advice on several other issues relating to the Ipperwash incident and/or other issues regarding the injunction which are not the direct subject matter of the legal opinion. Information related directly to the legal opinion and advice regarding the injunction has been disclosed to the appellant. In my view, an objective consideration of the Ministry's conduct with respect to these exempt records does not demonstrate an intention to waive privilege, and I find that the solicitor-client privilege has not been waived in the circumstances.

The appellant also points out in his representations that section 19 does not apply to circumstances where government employees who happen to be lawyers are acting in the role of civil servant and not Crown counsel. I agree with the appellant's position. However, I am satisfied that in all instances where I have upheld the section 19 exemption claim, the public servants involved were acting in the role of Crown counsel.

CABINET RECORDS

The Ministry claims that the information severed from Records J134-139 (J140-145 and M17-22 are duplicates) and M87 (M89 is a duplicate) are 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 J134-139. 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 J134-139 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 J134-139, 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 M87 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 M87 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 J373, M73, M76-79, M81-85, M86, M88, M234-238, M240, M243 and M380.

The Ministry has provided me with extensive background information regarding the nature of government deliberations in responding to the emergency situation at Ipperwash Provincial Park 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.

Record J373 is part of a larger record (J370-381). I have upheld the application of the section 19 exemption claim for Records J370-371 and J374-381. The Ministry submits that Record J373 provides advice with respect to communications, stakeholder management, legal mechanisms and other related issues. I described this record under the section 19 discussion as a handwritten draft of a meeting agenda, and pointed out that the Ministry has disclosed the typewritten portions of similar agendas. I found that Record J373 should be treated in the same manner, regardless of the fact that it is handwritten, and that it did not qualify for exemption under section 19. For the same reasons, I find that the record does not reveal the advice or recommendations of a public servant, and does not qualify for exemption under section 13(1). Because no additional discretionary exemptions have been claimed for this record, and no mandatory exemptions apply, it should be disclosed to the appellant.

Records M73, M76-79, M81-85, M234-238, M240, M243 and the typewritten portions of Records M86 and M88, 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 and parts of records qualify for exemption under section 13(1).

Finally, the Ministry explains that Record M380, 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.

I also find that none of the exceptions listed under section 13(2) apply to any of these exempt records.

The appellant submits that the Minister has publicly cited the legal advice he received regarding the seeking of an ex parte injunction. He, therefore, submits that section 13(3) applies, which states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

It must first be noted that the information which I have found to qualify for exemption under section 13(1) is not related to **legal** advice and, even if it were, section 13(3) cannot be used to override a section 19 exemption claim.

There is no evidence before me to indicate that the Ministry has publicly cited any of the records which I have found qualify under section 13(1) of the Act as the basis for making any decisions or formulating any policy with respect to the Ipperwash incident. Therefore, I find that section 13(3) has no application in the circumstances of this appeal.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims section 15(b) as the basis for refusing to disclose Records J77, J78, J401 and M90. This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;

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

1. the records reveal information received from another government or its agencies; and

2. the information was received by the Ministry in confidence.

The Ministry claims that the information severed from these records would reveal information received from the federal government regarding the Ipperwash occupation. The Ministry further submits that the information is highly sensitive and was submitted in confidence.

The records, on their face clearly indicate that the information was received from the federal government, thereby satisfying the first part of the test. I agree that the records contain sensitive information, and I accept the Ministry's position that it is the type of information that would be received in confidence. Accordingly, both parts of the test have been established, and I find that Records J77, J78, J401 and M90 qualify for exemption under section 15(b) of the Act.

ECONOMIC AND OTHER INTERESTS

The Ministry claims that parts of Records M179-183, M189-193 and M199-203 are exempt under section 18(1)(f) of the Act. The Ministry states that these records are three copies of the same document with minor differences (M199-203 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 M179-183, M189-193 and M199-203, 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 M179-183, M189-193 and M199-203 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.

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 for exemption under either sections 13(1) or 15(b). Specifically, these records are:

- Records M73, M76-79, M81-85, M86, M88, M234-238, M240, M243 and M380 and the typewritten portions of Records M86 and M88 - section 13(1); and

- Records J77, J78, J401 and M90 - section 15(b).

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, a member of the media, submits that the public interest in the province's handling of the Ipperwash crisis is clear and compelling. He points out that there have been repeated calls for a public inquiry by native groups, the family of the deceased, opposition parties in the legislature, civil liberties advocates, area residents, labour unions and the media. The appellant argues that this office should consider these many calls for a public inquiry as evidence of the compelling public interest in this matter. The appellant further argues that the government itself has acknowledged that a public interest in this matter exists.

With respect to the application of section 13(1), the appellant submits that the public interest in determining how a land claims dispute could escalate to a full-scale confrontation between the police and native groups clearly outweighs the understandable desire of civil servants to retain their ability to advise in confidence.

The appellant does not address the application of section 15(b).

The Ministry states that the majority of the records to which sections 13(1) and 15(b) 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.

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

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, 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 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(b), the Ministry argues that this section is intended to ensure that, in relations with other governments, information received by Ontario in confidence is protected from disclosure. The Ministry submits that such 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 this type of information.

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

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner [Sidney B.] 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 am not persuaded that there is a compelling public interest in disclosure of the information which I have found to qualify for exemption under section 15(b) of the Act. 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 section 15(b) exemption claim, I am unable to conclude that this public interest is sufficiently compelling to outweigh the purpose of this exemption. 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.

Accordingly, I find that section 23 does not apply to Records J77, J78, J401 and M90 in the circumstances of this appeal.

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 as demonstrated by the evidence provided by the appellant 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, a minimal amount of disclosure is required in order to ensure at least a minimal level of public scrutiny. Considering all of these factors, I am persuaded that there is 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 convinced 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 scope of section 13(1), 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 are 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 M73, M76-79, M81-85, M234-238, M240, M243, M380 and the typewritten portions of Records M86 and M88, which I previously found to be exempt under section 13(1).

ORDER:

1. I order the Ministry to disclose Records C57, C82, C92, C100, C108, C196, C206, C254, C281, C317, C323, C324-326, J373, M6, M73, M76-79, M81-85, M179-183, M189-193, M199-203, M230, M234-238, M240, M243, M339 and M380 in their entirety, and Records C91, M86 and M88 in accordance with the highlighted copy of these records which I have attached to the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator. The highlighted portions are **not** to be disclosed. Disclosure of these records must be made 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, with the exception of those records listed in the Supplementary Notice 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