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

# INTERIM ORDER PO-1954-I

## Appeals PA-010228-1, PA-010229-1, PA-010230-1 and PA-010231-1

## Ministry of the Solicitor General
## Ministry of the Attorney General
## Cabinet Office
## Ministry of Natural Resources

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## NATURE OF THE APPEAL:

The Ministry of Natural Resources (MNR), the Ministry of the Attorney General (MAG), the Ministry of the Solicitor General (MSG) and Cabinet Office (the institutions) each received the same request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to:

> ...any minutes, notes, transcripts, memos, summaries or any other items related to a meeting held on September 6, 1995. Attending this meeting were the Premier, the Minister of Natural Resources, and possibly other Cabinet Ministers, the Deputy Minister for the Attorney General, the Deputy Minister for the Solicitor General and the Superintendent of the Ontario Provincial Police, and possibly other staff members and Deputy Ministers.
>
> This was not a cabinet meeting, and as such, is not protected by section 12 of the Act.

Each institution responded by stating that, because a large number of records had to be reviewed, the time for answering the request was extended pursuant to section 27 of the *Act*. The requester did not appeal any of the four time extensions.

Subsequently, each institution issued a decision. MSG and MNR advised the requester that no records responsive to the request were located. MAG and Cabinet Office each identified five responsive records, and provided the requester with full access to one record and partial access to the other four records. The records and severances in both decisions were identical. The reason for withholding the remaining portions of these four records was that they contained information not responsive to the request.

The requester (now the appellant) appealed all four decisions.

In explaining the reasons for his appeals, the appellant identified that a group of First Nations protesters began to occupy Ipperwash Provincial Park (Ipperwash) on September 4, 1995, claiming that the park contained sacred burial grounds. The appellant maintains that at least two significant meetings took place to determine the direction that the government should take in dealing with this situation. He also identified that the Emergency Planning for Aboriginal Issues Interministerial Committee (the Interministerial Committee) met during this period to assist the government in responding to the situation in the park.

The appellant maintains that on September 6, 1995, Premier Mike Harris met with other Cabinet Ministers and several senior government officials to discuss the situation at Ipperwash. He also maintains that the Interministerial Committee met on that same day. During the night of September 6-7, 1995, a shooting incident occurred, resulting in the death of one of the protesters in Ipperwash.

The appellant maintains that a meeting attended by senior government officials took place and dealt with an important issue. He questions why there are no notes of attendees at that meeting, or files or correspondence relating to that meeting, other than the records already identified and disclosed to him.

The appellant's request is quite specific. He refers to a meeting that took place on one particular day, September 6, 1995, and restricts the scope of his request to meetings involving the Premier and Ministers of the Crown and/or senior government/Ontario Provincial Police (OPP) officials. His request encompasses identified Cabinet Ministers and senior government/OPP officials, as well as others holding these positions that are not specifically identified in the request. The request also lists the types of records the appellant is seeking, which is broad enough to encompass any responsive records as defined in the *Act*, including both hardcopy and electronic records. The appellant's request also makes it clear that he is seeking access to records actually prepared for or at a meeting held on September 6, 1995, as well as records that may have been prepared subsequently but which relate to the business conducted at a September 6, 1995 meeting. The request does not encompass any meetings held prior to September 6, 1995, nor any meetings held on September 6, 1995 that were not attended by the Premier and Cabinet Ministers and/or senior government/OPP officials.

Although the appellant refers to a specific meeting he believes was held on September 6, 1995, in my view, his request must be considered in context. The appellant makes it clear that he is not seeking access to records relating to meetings that did not involve the Premier and Cabinet Ministers and/or senior government/OPP officials. However, in my view, it is not reasonable to read the request restrictively to exclude any meetings attended that day by the Premier that did not include all of the individuals identified in the request itself. The appellant is, understandably, not fully aware of what activities took place on that date or who attended any particular meeting. He has provided what I assume to be his best information concerning who attended a particular meeting, in an effort to receive a focused and specific response. He distinguishes between meetings not involving the Premier and those that did and, in my view, any records relating to meetings held on September 6, 1995 involving the Premier and Cabinet Ministers and/or senior government/OPP officials on matters relating to Ipperwash are responsive to the appellant's request.

Section 50(2.1) of the *Act* provides the Commissioner's Office with discretion to dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the records to which the appeal relates exist. I determined that the appellant put forward a reasonable basis for concluding that more responsive records may exist in the custody or under the control of each of the four institutions. This was sufficient to meet the threshold test for these appeals to proceed on the issue of the adequacy of the searches for responsive records.

In appeals such as these, involving a denial of access on the basis that no or no additional responsive records exist, the sole issue to be decided is whether each of the four institutions has conducted a reasonable search for responsive records, as required by section 24 of the *Act*.

In accordance with procedures established for sole-issue reasonable search appeals, I sent a Notice of Inquiry to the parties at the same time as the Confirmation of Appeal. The Notice of Inquiry identified the background and the issue raised in each of these appeals, identified that a Mediator was assigned to the appeals, and indicated that, in the event the appeals were not resolved through mediation, an oral inquiry would be held to determine whether the institutions'

searches for responsive records were reasonable. The Notice of Inquiry also identified certain information that I would be seeking from the parties in regard to the issue raised by the appeals.

Prior to the oral inquiry, I issued a Supplementary Notice of Inquiry to the parties. This dealt with timing and administrative matters, representations on preliminary issues, and documentary material.

The oral inquires were held over the course of two days - September 12, 2001 and September 17, 2001. The appellant and an assistant attended the inquiries, as did at least one representative from each of the four institutions. The four institutions were represented by legal counsel and co-counsel who attended the inquiries.

## DISCUSSION:

## INTRODUCTION

As set out above, in appeals involving a denial of access on the basis that no or no additional responsive records exist, the sole issue to be decided is whether the institution has conducted a reasonable search for responsive records, as required by section 24 of the *Act*.

A number of previous orders have identified the requirements in reasonable search appeals. In Order PO-1744, which was referred to by legal counsel for the institutions (legal counsel), acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

Legal counsel also referred to Order PO-1920. In that order acting-Adjudicator Mona Wong stated:

> While the appellant has presented arguments as to why records should exist, my responsibility is not to determine whether records exist. Rather my responsibility is to determine whether the searches carried out by the Ministry in attempting to locate records responsive to the appellant's request were **reasonable**.

I agree with these statements.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the

request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

If, after hearing all evidence and argument by the parties, I am satisfied that the searches carried out were reasonable in the circumstances, the institution's decision will be upheld. If I am not satisfied, further searches may be ordered or other appropriate steps taken.

## THE REPRESENTATIONS

### General

Each of the four institutions took a similar approach in providing representations. The Freedom of Information and Privacy Co-ordinator for each institution (or the Special Advisor, First Nations in the case of MSG) (the Co-ordinators) submitted an affidavit outlining the various steps taken by the institution in initially responding to the request, and later when addressing the requirements outlined in the Notice of Inquiry. The information contained in each of these affidavits and the oral evidence provided at the inquiries were similar in nature. Each Co-ordinator outlined his or her expertise in identifying and searching for records; described the particular files or record holdings identified as the likely sources of responsive records; identified the individuals contacted and the questions asked of them in order to help identify responsive records; and stated the amount of time taken at various stages of the search process.

In some instances the Co-ordinators actually conducted searches themselves, but for the most part they acted in an advisory and/or quality assurance capacity, overseeing the gathering or identification of likely locations of records and individuals who might have knowledge concerning responsive records and obtaining the results of the various searches for inclusion in their affidavits. The affidavits themselves varied, depending on the approach taken by the particular institution in searching for records. In some cases the Co-ordinators had personally contacted individuals regarding their record holdings and/or personally reviewed specific files, and were able to provide a first-hand account; while in other cases the Co-ordinators relied on information provided to them by others.

The situation was slightly different for MAG. In addition to conducting the similar search activities undertaken by the other three institutions, MAG also reviewed its records held in the context of a civil action in which government is a defendant (*George v. Harris*, Superior Court of Justice file number 96-CU-99569). As MAG explained at the inquiry, once this action was commenced in February 1996, records relating to Ipperwash were identified in a number of institutions, including MNR, MSG and Cabinet Office, and forwarded to MAG. As a result, records that may at one time have been in the custody or under the control of one of these other

institutions were now in the custody of MAG and being used for the purposes of the law suit. MAG's representations at the inquiry addressed search activities relating to these litigation files, held by in-house MAG counsel and outside counsel retained to represent the Premier.

As a result of search activities undertaken in response to the Notice of Inquiry, two additional responsive records were identified. The responsive portion of one record, which was located by MSG, was disclosed to the appellant. The second record was located by MAG, who issued a decision to the appellant denying access on the basis that it qualified for exemption under section 19 of the *Act* (solicitor-client privilege).

At the September 17, 2001 inquiries, I was provided with the names of the individual authors of the four originally identified records, as well as the recipients of the one e-mail record. The fifth record, which was provided to the appellant in its entirety, was authored by co-counsel and sent to the lawyer representing the plaintiff in the *George v. Harris* law suit. This record confirmed that a meeting had taken place on September 6, 1995, and identified some individuals, including the Premier, who attended this meeting.

After receiving the affidavit and oral evidence at each of the inquiries, I asked to be provided with answers to two specific questions, which I determined were relevant and necessary in order for me to focus my questions regarding the activities undertaken by the institutions in identifying all records responsive to the appellant's request, and to determine whether they were reasonable in the circumstances:

1. What meetings were held on September 6, 1995 involving Premier Harris and other Cabinet Ministers and senior officials relating to the occupation of Ipperwash Park?

2. Who was in attendance at these meetings?

These questions were not answered. Legal counsel took the position that the two questions were not relevant to the issues before me in these appeals, and that in an appeal of this nature the provision of information not contained in a record is outside the purview of the *Act*. She acknowledged that at least one meeting had taken place that fell within the scope of the appellant's request, but maintained that if there was no actual record identifying the attendees at that meeting, there was no obligation on the part of the government to advise me of what meetings had been held and who attended them. In legal counsel's view, the extensive search activities undertaken by the four institutions would have identified any and all responsive records, and the evidence presented to me in this regard was sufficient to establish that all four institutions had conducted reasonable searches.

**Ministry of Natural Resources**

MNR's evidence was submitted by way of an affidavit and oral evidence given by the Ministry's Co-ordinator. Extensive searches were undertaken at both the request and appeal stages, including both hardcopy and electronic records, and records were retrieved from the government's Records Centre. A number of MNR employees were contacted, including staff in

the Minister's and Deputy Minister's Offices, as well as staff at both head office and regional offices. No responsive records were located.

However, the individuals holding the positions of Minister and Deputy Minister of Natural Resources on September 6, 1995 were not contacted, nor were their Executive Assistants. As well, MNR had a number of representatives on the Interministerial Committee, but not all of these individuals were contacted nor were all of their record holdings reviewed, even though they would reasonably be included among individuals who may have knowledge of responsive records, should they exist.

**Ministry of the Solicitor General**

The current Special Advisor, First Nations submitted an affidavit, and he and a lawyer from MSG presented oral evidence at the inquiry. Again, extensive searches were undertaken at both the request and appeal stages. These included all existing electronic records, as well as hardcopy records in the custody of various ministry and Ontario Provincial Police (OPP) officials and other records retrieved from the Records Centre and others searched at the provincial Archives. The current Executive Assistant of the former Solicitor General was contacted, as was the former Deputy Minister and her Special Assistant on Policing Matters. As far as the OPP was concerned, the individuals holding the positions of Special Advisor, First Nations in September 1995 were both contacted, as were various OPP officers and officials involved in various aspects of the Ipperwash incident. Their record holdings were reviewed as part of the search activities. Notebooks of the OPP Commissioner and Deputy Commissioner who held office in September 1995 were also searched. Although not covered in the Coordinator's affidavit, at the resumption of the inquiries on September 17, 2001, the appellant and I were provided with a copy of a letter sent by MSG's lawyer to legal counsel, advising her that the former and current OPP Commissioners were contacted and that they had advised him that they were not aware of any records prepared for, during or after any relevant September 6, 1995 meeting.

Although the individuals contacted by MSG and the searches undertaken for responsive records were more focused and comprehensive than some of the other institutions, the former Minister was not contacted directly and questioned about the meetings, despite the fact that his then-Deputy Minister was specifically identified as having attended a meeting on September 6, 1995 in one of the records disclosed to the appellant in response to his request. Also, it would appear that no contact was made with the former OPP Commissioner until September 14, 2001, after all search activities had been completed, despite the fact that he is a named defendant in the *George v. Harris* law suit and would reasonably be included among individuals who may have knowledge of responsive records, should they exist.

**Ministry of the Attorney General**

Most of the evidence provided by MAG was contained in an affidavit submitted by the Ministry's Co-ordinator. The Co-ordinator also provided oral evidence, as did co-counsel. As with the other institutions, extensive searches for both hardcopy and electronic records were undertaken throughout MAG and the Ontario Native Affairs Secretariat, at both the request and

appeal stages. A number of individuals were contacted, including senior officials in the office of the current Minister and current Deputy Minister and various divisions of MAG. The Co-ordinator also described search activities undertaken by MAG for responsive records held in the context of the *George v. Harris* law suit. Co-counsel, who represents some of the defendants in this law suit, also advised that he had spoken to lawyers involved in related litigation taking place in September 1995, as well as certain defendants in the law suit. As noted earlier, MAG identified five responsive records. At the September 12, 2001 inquiry, MAG was not able to identify the authors of the three handwritten records, or the recipients of the one e-mail record. This information was provided when the inquiries resumed on September 17, 2001.

Understandably, given the litigation in which MAG represents a number of the defendants, MAG has custody of many Ipperwash-related records, including many which at one time were in the custody or under the control of other institutions, including MNR, MSG and Cabinet Office. Although I have no difficulty in accepting that extensive searches were undertaken in dealing with the appellant's request, some key individuals were not contacted and asked about possible records. For example, although limited efforts were apparently made to locate the former Deputy Attorney General, who was identified among the attendees at a September 6, 1995 meeting and is the author of one of the handwritten records, he was not contacted in the context of this appeal. As well, one of the records disclosed by MAG to the appellant was authored by the former Executive Assistant to the former Attorney General, yet he was not contacted regarding possible other responsive records, nor were the three individuals who were identified as having received the e-mail record that was disclosed to the appellant.

**Cabinet Office**

The Co-ordinator for Cabinet Office provided an affidavit and oral evidence at the inquiry. His evidence focused on various searches for electronic and hardcopy records at the request and appeal stages. The Co-ordinator explained that a lawyer for the outside law firm representing the Premier in the *George v. Harris* law suit had undertaken all searches at the request stage, but that he himself had become involved once the matter was appealed to the Commissioner's Office. The Co-ordinator identified a large number of individuals who were contacted and questioned by him and others regarding the existence of responsive records. Included among them were the Executive Assistant to the current and former Secretaries of Cabinet, as well as current and former senior officials of Cabinet Office and the Premier's Office. The Coordinator did not contact the Premier's former Executive Assistant, but states in his affidavit that he was advised that she was also contacted. He explained at the inquiry that this person was contacted by the Premier's outside legal counsel. Although not included in the affidavit, the Co-ordinator stated at the inquiry that the Premier had also been contacted, as had a former senior official in the Premier's Office who is a defendant in the law suit. The Co-ordinator clarified that he had been advised of these two contacts by the Premier's outside legal counsel (for the Premier) and by a current member of the Premier's political staff (for the former official). The Coordinator explained that this information had not been included in his affidavit because he was only advised that the contacts had been made between the time he swore the affidavit on September 11, 2001 and the September 17, 2001 date of the inquiry.

Again, there is no question that a great deal of time and effort went into the various search activities undertaken by Cabinet Office. However, despite these efforts, a number of deficiencies remain. For example, the author of two of the responsive records already provided to the appellant, who I understand was the chair of the Interministerial Committee, was not included among the individuals contacted by the Co-ordinator. Co-counsel indicated that he had spoken to this individual on Ipperwash-related issues, but it was not clear to me whether or not she was approached specifically in the context of the appellant's request and appeal and asked specific questions regarding the possible existence of responsive records. Cabinet Office and the Premier's Office also appear to have been represented on the Interministerial Committee by two individuals, yet one of them was not contacted or referred to in the Co-ordinator's affidavit. When asked to explain, the Co-ordinator indicated that he thought unsuccessful efforts had been made to contact this person, but no specific details were provided. The Co-ordinator also stated that he had asked for but had not been provided with a listing of individuals attending the September 6, 1995 meeting identified in the appellant's request.

## The Appellant

After receiving representations from the various institutions, the appellant was given an opportunity to explain the basis for his belief that more responsive records should exist. The appellant's arguments were similar for all four institutions. In his view, without clearly knowing what meetings involving the Premier had taken place on September 6, 1995, and who was in attendance at the meetings, it was not possible to conclude with any reasonable degree of certainty that all appropriate officials had been contacted, all relevant questions asked of these individuals, and all record holdings searched. The appellant expressed puzzlement that no notes, other than those already produced, were prepared for, during or after a meeting concerning what was clearly a matter of significant importance involving the Premier, a number of Cabinet Ministers and senior government and OPP officials.

## ANALYSIS

Part IV of the *Act* outlines the process for conducting appeals. Section 50 establishes a right of appeal; section 51 permits mediation; section 53 establishes the burden of proof; section 54 describes the disposition of the appeal by order of the Commissioner; section 55 outlines confidentiality, compellability and privilege issues relating to an inquiry; and section 56 permits the Commissioner to delegate her powers.

Section 52 of the *Act*, which is also in Part IV, describes the inquiry process itself. In particular, section 52(4) identifies the powers of the Commissioner during an inquiry:

> In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

Section 52(8) identifies other inquiry powers as follows:

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

Section 61(1) of the *Act* outlines various offences, including section 61(1)(d) which reads:

> No person shall,
>
> > willfully obstruct the Commissioner in the performance of his or her functions under this Act;

Clearly, the legislature in structuring the inquiry process in the *Act* carefully considered the types of powers and duties the Commissioner should have at her disposal, if required, in conducting inquiries, and made it clear that these powers were to be respected.

In structuring my inquiries in these four appeals, I included specific questions in the Notices of Inquiry that identified the type of evidence and representations I needed to have addressed by the institutions. Included among them were:

1. Have all persons in attendance at the September 6, 1995 meeting, referred to in the request, been notified and asked about the existence of responsive records?

2. Have all relevant current and former Ministry employees and Ministry officials, including elected officials and political staff, been contacted and asked about the existence of responsive records?

In so doing, I made it clear that I needed to know who was in attendance at any relevant September 6, 1995 meetings, and that responsible officials had adequately searched for records relating to these individuals. At the three oral inquiries on September 12, 2001, I again made it clear to each Co-ordinator and to legal counsel that I needed to know: (1) what meetings had taken place, and (2) who was in attendance at these meetings. I advised counsel and the Co-ordinators that without answers to these questions, I was unable to focus any subsequent questions regarding the activities undertaken by the institutions in identifying all records relating to these meetings, and to determine whether the searches were reasonable and adequate in the circumstances. When the third inquiry (MAG) resumed on September 17, 2001, I started by again asking these questions, and I raised the same two questions later that day during the fourth inquiry involving Cabinet Office. During the MAG inquiry, I offered legal counsel the option of providing me with this information in the absence of the appellant, along with the opportunity to submit argument as to why the information should not be shared with the appellant. She declined this offer. My questions were not answered, not because the answers were not known by the government, but because, in the view of legal counsel, the questions were not relevant and the provision of information that is not contained in a record is outside the purview of the *Act*.

The institutions' position is simply not acceptable.

In conducting a reasonable search inquiry, the *Act* gives me the power as well as the obligation to satisfy myself that all reasonable steps have been taken to locate and identify records responsive to a request. I have the ability as well as the responsibility to determine what questions are objectively relevant in this regard, and to require that these questions be answered. In the context of these four inquiries, I determined that the most basic of questions associated with any reasonable search appeal of this nature were relevant and needed to be answered, and it is not acceptable for the government to refuse to answer direct questions of this nature, and to require me to accept indirect answers derived from the evidence it chooses to submit.

After hearing all evidence and argument provided by the four Co-ordinators and legal counsel on September 12, 2001 and September 17, 2001, I knew that one meeting concerning events in Ipperwash involving Premier Harris took place on September 6, 1995, and I knew the identity of some of the individuals who attended that meeting. However, I still did not know whether other meetings involving the Premier had taken place on that date, nor did I know the full list of attendees at the one meeting.

As far as the affidavit and oral evidence provided by the various institutions are concerned, I find that, although extensive searches were undertaken by all four institutions, they were nonetheless insufficient to establish that reasonable efforts were made to identify and locate all records responsive to the appellant's request. In my view, each institution defined the search parameters incorrectly. Rather than identifying the individuals and possible record locations specifically responsive to the appellant's relatively narrowly defined request, and then comprehensively questioning these individuals and searching for any responsive records, the institutions chose instead to contact a large number of individuals who may have been involved in some aspect of the Ipperwash incident, and to review a wide range of record holdings relevant to the incident and subsequent litigation. In other words, the institutions took what I would describe as a broad and often shallow approach to search activities when a narrower and deeper one would have been more appropriate. As a consequence, I have concluded that significant questions remain unanswered, and that all reasonable search activities have not yet been undertaken.

## ACTIVITIES FOLLOWING ORAL INQUIRIES

A number of events took place after the September 12, 2001 and September 17, 2001 inquiries, which relate either directly or indirectly to these appeals.

I understand that a Superior Court of Justice hearing took place on September 26, 2001, which dealt with certain matters in the *George v. Harris* law suit. In that context, certain records were filed with the court and reported in the media in the days leading up to that hearing. According to press reports, these records include notes taken at various meetings held on September 5 and 6, 1995 relating to the Ipperwash incident, and a number of individuals referred to in the press accounts are the same individuals whose record holdings were searched in response to the appellant's request. It is not clear that these records relate to meetings that fall within the scope

of the appellant's request but, based on the evidence provided to me in the four inquiries, I cannot conclude with any reasonable degree of certainty that they do not.

On September 25, 2001, I received a letter from the government's legal counsel. In it, she reiterates her position that "the provision of information that is not contained in a record is outside of the purview of the legislation", but then goes on to provide a list of individuals that were identified to her by co-counsel as having been in attendance at the September 6, 1995 meeting referred to in the appellant's request. She also confirms, based on information provided by co-counsel, that no other relevant meetings were held on that day: "That is, a meeting in which the Premier, the Minister of Natural Resources, the Deputy Attorney General and the Deputy Minister of the Solicitor General and others were in attendance". No explanation was offered as to why information that was strongly resisted during the inquiries is now being provided to me outside the inquiries themselves, other than the statement at the end of the letter which reads: "Let me confirm the Ministries' desire to maintain a positive working relationship with your Office, and respectfully submit the above information in furtherance of this objective." The information contained in this letter would have been useful had legal counsel provided it during the course of the inquiries. As I made clear to the Co-ordinators and legal counsel on a number of occasions, information confirming the relevant meetings and attendees is the logical starting point for these type of appeals, and the information in the September 25, 2001 letter would have helped me to focus subsequent questions regarding the search activities undertaken to identify all responsive records.

Legal counsel indicates that the information in her September 25, 2001 letter may be shared with the appellant, and I will attach a copy of this letter to the appellant's copy of this interim order.

**CONCLUSIONS**

It is important to reiterate that the *Act* does not require an institution to prove with absolute certainty that any records or any additional records do not exist. What is required of institutions in reasonable search appeals is to provide sufficient evidence to show that reasonable efforts were made to identify and locate responsive records.

Although the search activities undertaken by the four institutions in these appeals were unquestionably extensive, given the approach adopted by the institutions, and the resulting error in defining the proper search parameters, I am unable to satisfy myself that all reasonable efforts have been made. The reason for these deficiencies, in my view, stems from the apparent decision on the part of the government to rely on indirect evidence when direct evidence would have been more appropriate. I am unclear as to why this approach was adopted, but at the end of the day I must make my decisions based on the evidence and arguments presented by the institutions and legal counsel. At many stages of the inquiry process, beginning with the Notice of Inquiry, and throughout the two days of oral inquiries, I made it clear what type of evidence I required in order to satisfy myself that all reasonable steps have been taken to identify records responsive to the appellant's request. That type of evidence was not forthcoming.

I will take into account the information provided by legal counsel in her September 25, 2001 letter in formulating my order provisions in this interim order.

## INTERIM ORDER:

1. I order the four institutions listed in Appendix A of this interim order to provide me with affidavits sworn by each of the individuals listed under the institution's name, answering the following questions:

   - did you create any hardcopy or electronic records prior to and in preparation for any meetings held on September 6, 1995 that involved Premier Harris and other Cabinet Ministers and/or senior government/Ontario Provincial Police officials dealing with matters relating to Ipperwash Provincial Park?

   - if you attended any such meeting, did you create any records at the meeting?

   - did you create any records following any such meeting that relate to the business conducted at the meeting?

   - were any records created by others and provided to you either prior to, during or following any such meeting?

   - what steps did you take to assure yourself that no records responsive to the appellant's request were within your custody or under your control?

   - are you aware of the existence of any responsive records that may have been created and/or maintained by other individuals that are responsive to the appellant's request, and if so, who would have custody or control of any such records?

   The affidavit from Premier Harris should also answer the following question:

   - what meetings did you attend on September 6, 1995 involving other Cabinet Ministers and/or senior government/Ontario Provincial Police officials, and who was in attendance at any such meetings?

   I will accept affidavits from the Co-ordinators (or the Special Advisor, First Nations in the case of MSG) on behalf of any individuals listed in Appendix A under their institution's name, provided that the deponents of the affidavits give their evidence based solely on first hand, direct conversations with the listed individuals not providing personal affidavits.

   The affidavits must be submitted to me by **October 22, 2001**.

The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

2. If, after contacting the various individuals listed in Appendix A, and conducting searches for responsive records that stem from the answers to the various questions, any institution identifies additional records responsive to the request, I order any such institution to provide a decision letter to the appellant regarding access to these records in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this interim order as the date of the request and without recourse to a time extension.

3. The affidavits referred to in Provision 1 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor St. West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. I remain seized of these matters with respect to compliance with this interim order or any other outstanding issues arising from these appeals.

Original signed by: October 3, 2001
Tom Mitchinson
Assistant Commissioner

# APPENDIX A

## Ministry of Natural Resources

Honourable Chris Hodgson, former Minister of Natural Resources
Robert Vrancourt, former Deputy Minister of Natural Resources
Jeff Bangs, former Executive Assistant to Mr. Hodgson
The person holding the position of Executive Assistant to Mr. Vrancourt in September 1995
All ministry representatives on the Interministerial Committee

## Ministry of the Solicitor General/Ontario Provincial Police

Honourable Robert Runciman, former Solicitor General
Elaine Todres, former Deputy Solicitor General
Kathryn Hunt, former Executive Assistant to Mr. Runciman
Barbara Taylor, former Special Assistant to Ms. Todres on Policing Matters
Ron Fox, former Special Advisor to Ms. Todres for First Nations Policing
Scott Patrick, former Special Advisor to Ms. Todres for First Nations Policing
All ministry and Ontario Provincial Police representatives on the Interministerial Committee
Thomas B. O'Grady, former Commissioner, Ontario Provincial Police
Christopher Coles, former Chief Superintendent, Ontario Provincial Police
John Carson, Superintendent, Ontario Provincial Police
Mark Wright, Detachment Commander, Ontario Provincial Police
Kenneth Deane, Acting Sergeant, Ontario Provincial Police

## Ministry of the Attorney General/Ontario Native Affairs Secretariat

Honourable Charles Harnick, former Attorney General and Minister responsive for the Ontario Native Affairs Secretariat
Larry Taman, former Deputy Attorney General
David Moran, former Executive Assistant to Mr. Harnick
Frances Noronha, former Executive Assistant to Mr. Taman
Yan Lazar, Assistant Deputy Attorney General and Secretary for Native Affairs
Michel Fordyce, former Assistant Secretary for Native Affairs
All ministry and Ontario Native Affairs Secretariat representatives on the Interministerial Committee

## Cabinet Office/Premier's Office

Honourable Michael D. Harris, Premier of Ontario
Rita Burak, former Secretary of Cabinet
Deborah Hutton, former Executive Assistant to Mr. Harris
The person holding the position of Executive Assistant to Ms. Burak in September 1995
Julie Jai, former official in Cabinet Office and representative on the Interministerial Committee
All other Cabinet Office and Premier's Office representatives on the Interministerial Committee
Bill King, former senior official in the Premier's Office
Marcel Beaubien, Member of Provincial Parliament