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

INTERIM ORDER PO-2033-I

Appeal PA-000370-3

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry, now the Ministry of Public Safety and Security) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media, for access to "all video footage recorded by the Ontario Provincial Police (OPP) at Ipperwash Provincial Park (Ipperwash) from September 5-7, 1995" and "all photos taken by the OPP at Ipperwash Provincial Park from September 5-7, 1995."

The Ministry advised the requester that it required a 60-day time extension in order to process the request and to conduct an extensive search for responsive records. The requester agreed to this extension. The Ministry later advised the requester that it required a second 30-day extension. The requester (now the appellant) appealed this additional extension, and this issue was resolved through mediation by this office.

The Ministry issued a decision letter to the appellant, denying access to all videotapes and photographs it had identified as being responsive to the request. The Ministry relied on one or more of the following exemptions: law enforcement (section 14), and invasion of privacy (section 21). The Ministry also advised the appellant that, pursuant to sections 14(3) and 21(5) of the *Act*, it could neither confirm nor deny the existence of any further responsive records.

The appellant appealed this decision.

During mediation, the Ministry conducted a further search and located additional responsive records. The Ministry continued to rely on sections 14 and/or 21 as the basis for denying access to all records, but withdrew the "refuse to confirm or deny" exemption claims in sections 14(3) and 21(5).

In a subsequent decision, the Ministry granted access to 2 videotapes of aerial shots and 62 photographs containing general information. The Ministry also advised the appellant that it was no longer relying on section 14(1)(f), so the applicability of this discretionary exemption is no longer at issue in this appeal.

As far as the remaining records are concerned, the Ministry clarified that it was relying on section 14(1)(h) with respect to one category of records; and 21 (with specific reference to sections 21(2)(e), (f) and (i) and section 21(3)(b)) for all undisclosed records.

Mediation did not resolve this appeal, so it was transferred to the adjudication stage of the appeal process. I initially sent a Notice of Inquiry to the Ministry, which outlined the facts and issues in the appeal, and I received representations in response. The non-confidential portions of the Ministry's representations were shared with the appellant, along with the Notice, and she responded with representations. I decided that the appellant's representations raised issues that the Ministry should have an opportunity to address, including the possible application of section 23 (public interest override). I sent the Ministry a second Notice of Inquiry, together with the non-confidential portions of the appellant's representations. The Ministry submitted supplemental representations. The non-confidential portions of this second set of representations were then shared with the appellant, and she submitted a final set of representations in reply.

RECORDS:

The Ministry has divided the records into four categories.

Category 1 consists of 6 videotaped news reports that were confiscated from media outlets under the authority of a *Criminal Code* search warrant. The OPP created 16 photographs from these videotapes as part of its investigation, and these photographs are also included in Category 1. The Ministry relies on sections 14(1)(h) and 21 to deny access to all Category 1 records.

Category 2 consists of the 2 videotapes and 62 photographs disclosed to the appellant during mediation, as well as 4 other videotapes and 72 photographs that have not been disclosed. These records depict various activities taking place at Ipperwash during the September 5-7, 1995 period. The Ministry denies access to the remaining Category 2 records based on section 21 only.

Category 3 consists of one record, a videotaped witness statement of an interview conducted by the OPP. Section 21 is the only exemption claim relied on by the Ministry for this record.

The Ministry indicates that the appellant's request is sufficiently broad to include "a potential fourth category, videotaped surveillance records obtained under Parts VI (wiretap) and XV of the *Criminal Code*." Without making any finding about the possible existence of any such records, I will identify them as Category 4 records for ease of reference in this interim order.

PRELIMINARY ISSUES:

PUBLICATION OF INTERIM ORDER

In the covering letter accompanying the appellant's representations, the appellant asks that my order in this appeal not be "published" until there has been a final determination of whether the records will be disclosed. Specifically, she asks that "the decision not be published before the time for filing a notice of application for judicial review has expired, and not be published while any judicial review proceedings take place." The reasons offered to support this request are that the appellant has discovered the existence of the records at issue in this appeal through her research; their existence is not generally known; and she has a financial interest in their existence being kept confidential until there has been a final determination of whether they will be made public.

The question of whether the existence of responsive records would be kept confidential during judicial review proceedings would be for the court to decide. While copies of the records themselves are normally the subject of a sealing order on judicial review under section 137(2) of the *Courts of Justice Act*, section 135(1) of that statute mandates that the judicial review proceedings themselves take place in open court unless the public is excluded under section 135(2). In my view, notwithstanding that the *Act* permits hearings before the Commissioner to be conducted in private – see, for example, sections 52(3) and 52(13) – the rationale for publication of the Commissioner's orders relates to the public interest in open proceedings and

public access to documents protected by sections 135(1) and 137(1) of the *Courts of Justice Act*. It is important for the public to be informed of decisions made by the Commissioner absent compelling reasons to support non-publication, for example, where publication would disclose the content of records at issue in the order, and nullify any meaningful opportunity for judicial review.

Other than the assertions in her letter, the appellant has not provided evidence to support her position, nor any case law providing analogous examples of non-publication by courts or tribunals.

In *Ontario (Solicitor-General v. Ontario (Information and Privacy Commissioner))* (1993), 102 D.L.R. (4th) 602 (reversed on other grounds at (1993), 107 D.L.R. (4th) 454 (C.A.), leave to appeal refused (1994), 112 D.L.R. (4th) viii (S.C.C.)) the Divisional Court declined a request to exclude the public from a judicial review hearing involving an order of the Commissioner, stating that "… [e]xcept in the most exceptional circumstances, proceedings before courts must be open to the public" (at p. 603).

In *McCreadie v. Rivard*, 43 C.P.C. (3d) 209 (Ont. Ct. (Gen. Div.)), the Court considered a motion to exclude the public and for a publication ban on the basis that publication would detrimentally affect the financial affairs of the plaintiff, in particular its ability to generate revenue. The Court dismissed the motion, holding that:

> … the material in the present motion is insufficient to support an exception being made to the rule of public access in that it fails to clearly show that a social value of superordinate importance requires protection. … The evidence that publicity would result in financial harm … is not sufficiently specific and requires speculation on the part of the Court. On the other hand, the public have the right to know what is going on… (at para. 16).

And in *Sierra Club v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, the Supreme Court of Canada considered a request to seal documents under a provision similar to section 137 of the *Courts of Justice Act* in the *Federal Court Rules*, on the basis of possible damage to a commercial interest. Justice Iacobucci, writing for the Court, stated as follows (at pp. 211-212):

> Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and,

> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> … I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
>
> In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *N. (F.) (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, 188 D.L.R. (4th) 1, at para. 10, the open court rule only yields "where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).
>
> In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.) at p. 439.
>
> Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

In my view, in the present case the appellant has failed to demonstrate that "a social value of superordinate importance requires protection". Nor has she shown that any commercial interest affected goes beyond being "merely specific to the party in question" or satisfied me that it is "expressed in terms of a public interest in confidentiality."

For these reasons, I have decided that this interim order will be published on **August 26, 2002**.

RESPONSIVENESS OF RECORDS

Seven records (photographs A12-A15 and D1-D3) are dated September 4 or 8, 1995, which is outside the timeframe of the appellant's request. The Ministry has not provided me with copies of these records. Given the precise dates cited in the request, and the sensitive nature of the issues raised in this appeal, I find that these seven records fall outside the scope of the request, and I will not address them in this interim order.

RECORD QUALITY

As stated earlier, the Ministry disclosed 2 videotapes and 62 photographs from among the Category 2 records. Following disclosure, the appellant wrote to the Ministry complaining about the quality of the disclosed records. According to the appellant, rather than making dubbed copies of the 2 videotapes, the Ministry "appears to have filmed a television screen on which the requested videotapes were played… [and some of the] footage is even obscured for a portion of one of the tapes by someone walking in front of the TV screen!" As far as the photographs are concerned, the appellant maintains that the copies provided "are poor black and white photocopies of what appear to be colour photos". It would appear that the Ministry did not respond to the appellant's request for better quality records.

In my view, any videotape records disclosed by the Ministry should be of comparable quality to the originals, and I can see no reason why actual dubs of the two videotapes cannot be provided. Similarly, if the originals of the photographs disclosed to the appellant were in colour, then the copies provided to the appellant should also be in colour, and of comparable quality.

I will include a provision in this order requiring the Ministry to provide the appellant with new copies of the 2 videotapes and 62 photographs, at a comparable quality to the original records, at no cost to the appellant.

REQUEST TO VIEW ORIGINAL RECORDS

According to the appellant, she also asked the Ministry for an opportunity to inspect the original 2 videotapes and 62 photographs disclosed to her. Again, it would appear that the Ministry did not respond to the appellant's request.

Section 30(2) of the *Act* states:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

The relevant provisions of section 3 of Regulation 460 made under that *Act* provide:

> (1) A head who provides access to an original record must ensure the security of the record.
>
> (2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution.

In her representations, the appellant made reference to her request to the Ministry for viewing access. These representations were provided to the Ministry in the context of this inquiry. The Ministry made no reference to this request in its reply representations, and I have been given no indication by the Ministry that allowing the appellant to examine the original records would not be "reasonably practicable" in the circumstances.

Accordingly, I will include a provision in this order requiring the Ministry to provide the appellant with an opportunity to view the original 2 videotapes and 62 photographs disclosed to her, in accordance with the provisions of section 30(2) of the *Act* and section 3 of Regulation 460.

CATEGORY 4 RECORDS

As noted above, the Ministry has identified "a potential fourth category, videotaped surveillance records obtained under Parts VI (wiretap) and XV of the *Criminal Code*". The Ministry claims that such records, if they exist, are excluded from the scope of the *Act*. This argument is based on the doctrine of federal legislative paramountcy, as addressed in Orders P-344 and P-625. Its effect, if accepted, would be to exclude this potential category of records, if they exist, from the scope of the *Act*.

I have received representations from both parties on this issue.

In my view, section 109 of the *Courts of Justice Act* requires that notice of this constitutional question be given to the Attorneys General of Canada and Ontario. This section states, in part, as follows:

> (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:
>
> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question …
>
> (2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

> (2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.
>
> (6) This section applies to proceedings before boards and tribunals as well as to court proceedings.

Although the usual practice would be for the party raising the constitutional issue to notify the Attorneys General, as set out in section 109, I have decided that, in the circumstances of this appeal, it is appropriate for me to provide this notice, and I have done so.

Accordingly, I have decided to defer my decision on any Category 4 records, if they exist, in order to provide time for responses in relation to the constitutional question.

DISCUSSION:

LAW ENFORCEMENT

Section 14(1)(h) provides a discretionary exemption for records whose disclosure could reasonably be expected to "reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation." The Ministry relies on this exemption for all Category 1 records, described above.

The Ministry submits that "[t]he OPP executed a series of search warrants on media outlets obtained under the authority of section 487 of the *Criminal Code*". The Ministry provided me with a copy of these warrants along with its representations.

The appellant submits that while certain records were seized from the media or produced from videotapes seized from the media, "there is no continuing law enforcement basis on which to withhold them." She submits that "[a]ll prosecutions relating to the events at Ipperwash are now complete" and "[t]he original basis for applying this discretionary exemption no longer exists."

I do not accept the appellant's position. I find that all of the section 14(1)(h) requirements are present as they relate to the Category 1 records. Specifically, I find that an OPP police officer is clearly a "peace officer", and that the search warrants obtained by the OPP in order to seize the videotapes are sufficient evidence to establish that the records were "confiscated from a person", specifically the various media outlets; and that this confiscation was "in accordance with an Act or regulation", specifically section 487 of the *Criminal Code*. Nothing in the language of section 14(1)(h) suggests that it applies only during a "continuing law enforcement" matter, as suggested by the appellant; it requires only that disclosure would reveal a record confiscated in the manner stipulated.

My finding with respect to the 6 videotapes that were actually seized by the OPP also applies to the 16 photographs for the same reasons, since these photographs were derived directly from the videotapes and contain only information identical to that found on the videotapes.

The "public interest override" at section 23 of the *Act* does not apply to records that are exempt under section 14. Accordingly, I uphold the Ministry's decision to deny access to all Category 1 records.

PERSONAL INFORMATION

Because I have found that all of the Category 1 records qualify for exemption under section 14(1)(h), I will not consider them under the personal information exemption claim.

Introduction

The section 21 personal privacy exemption applies only to personal information, as defined in section 2(1) of the *Act*. "Personal information" means, in part, recorded information about an identifiable individual, including information relating to race, national or ethnic origin (paragraph (a)) and information relating to the medical history of an individual (paragraph (b)).

The appellant does not take the position that any of the records contain her personal information, and I find that none do.

The Ministry and the appellant both provided detailed representations on this issue.

The Ministry submits, in part:

> [P]ortions of the information contained in the records are recorded information about identifiable individuals, other than the requester, in accordance with section 2(1) of the *Act*.
>
> The Ministry submits that the records contain the personal information of identifiable individuals who were the subject to [sic] or questioned during the course of the OPP criminal investigations.

In response, the appellant highlights the Ministry's submission that only portions of the information in the records fall within the definition of "personal information." She submits that any portions that do not contain personal information should be severed and disclosed pursuant to section 10(2) of the *Act*.

The appellant also submits, in part:

> The [appellant] can only speculate as to what is on the videos or photos that might constitute "personal information"; however, the following principles garnered from previous decisions of [the Commissioner's Office] may be relevant:
>
> 1. If there is no reasonable expectation that the individual videotaped or photographed can be identified from the record (due, for example, to distance, lack of light or obscuring objects) the "personal information"

definition does not apply. Only information about an "identifiable individual" falls within the definition in [section] 2(1) of the *Act*.

2. The occupation of Ipperwash Provincial Park was a collective action undertaken [by] the Stoney Point people, who claim a treaty or aboriginal right to occupy that land. References to or opinions expressed by native leaders or spokespersons for the native group do not constitute "personal information": see, e.g., Orders P-1412, P-1621.

3. The individuals who occupied Ipperwash, acting as leaders or representatives of their community, voluntarily took part in a public protest that was intended to attract and did attract media and public attention to their land claim. The following passage from Order P-978, relating to community representatives, community leaders, and others who involved themselves in the public controversy relating to the performance of "Show Boat" is relevant. [Former Adjudicator Mumtaz] Jiwan stated in that order:

> *In my view, individuals in such positions, necessarily decide to forego an element of their personal privacy by taking a stand on an issue of importance to them or when attending events which are covered by the press and reported in the media.* It is significant to note that some of the individuals referred to in the records, voluntarily lent their support to a matter of public concern. It is also significant that the issues surrounding the Show Boat performance have been well documented in the media. *Under such circumstances, it is not reasonable to expect that these individuals' identities would be kept confidential. As such, it is my view that this information cannot be characterized as the personal information of these individuals.* [emphasis added by appellant]

The same principle applies in this case.

4. It does not appear from the Ministry's submissions that it is relying on the privacy interests of any police officers whose images may be seen in any of the videos or photographs. The Ministry's failure to advance such an argument is consistent with the Commissioner's jurisprudence defining "personal information" under the *Act*. The videos and photographs are factual records of duties performed by OPP officers in their employment, professional or official capacity. As such, they do not contain the "personal information" of the police officers: see, e.g. Orders P-257, P-289, P-1044.

In reply to the appellant's representations, the Ministry submits:

> The phrase "personal information" is defined in section 2(1) as "recorded information about an identifiable individual". The section lists, in clauses (a) through (h), certain examples of information, which are included in the definition of "personal information" for the purposes of the *Act*. The Commission has held, however, that the list set out in clauses (a) through (h) is not exhaustive. In Order 11, the Commissioner said:
>
> > *It is clear from the wording of the statute that the list of examples of personal information under section 2(1) is not exhaustive. This leaves it open for [the adjudicator] to decide whether or not information contained in the records which does not fall under subsections (a) to (h) ... constitutes personal information.* [emphasis added by the appellant]
>
> ...
>
> A portion of the records at issue contains video footage in which a large number of identifiable persons are present. The video contains personal information, which by the nature of the videotape, is heavily intertwined. The Ministry does not have the ability to sever persons from the record.
>
> …
>
> It is the position of the Ministry that the records, in this case, contain the information of police officers, which is not personal information, and in addition, the personal information of identifiable individuals compiled during police investigations. The interest here is to protect and ensure that no person identified in the record would have their personal information released inappropriately.

The Ministry also refers to Orders PO-1959 and PO-1966, both of which dealt with the feasibility of severing audiotapes and videotapes, respectively.

In her final set of representations, the appellant submits, "[t]he mere recording of the presence of the native protesters in the Park does not constitute personal information." Citing Order P-978 and the Supreme Court of Canada's decision in *Aubry v. Editions Vice-Versa Inc.*, [1998] 1 S.C.R. 591, she submits that those who participated in the occupation of Ipperwash were protesters who could not reasonably have expected that their identities would remain confidential or that they would not be observed.

The appellant also submits that information about native leaders is not their personal information. She cites previous orders relating to the Ipperwash occupation, such as Orders P-1412 and P-1621, which held that reported opinions of native leaders do not constitute personal information.

Finally, the appellant submits that the Ministry has not provided any evidence that it cannot sever personal information from the videotapes.

In determining whether the records contain personal information, I have taken into consideration the definition of "personal information" in section 2(1), as well as previous orders of this office that have interpreted the term. I agree with and adopt former Commissioner Sidney B. Linden's finding in Order P-11, cited by the Ministry, that section 2(1) does not provide an exhaustive list of examples of personal information. A record may be found to contain personal information even if it cannot be classified as one of the listed examples in subsections (a) through (h) of the definition. Likewise, in Order PO-1834, Senior Adjudicator David Goodis found that the word "including" in the definition of personal information indicates that the listed categories do not have an exhaustive effect.

Former Commissioner Tom Wright stated in Order P-230 that "provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner", and I will adopt this non-restrictive approach in determining whether the definition of "personal information" applies to the various records at issue in this appeal.

Section 2(1) of the *Act* provides that a "record" means "any record of information however recorded, whether in printed form, on film, by electronic means or otherwise" and includes photographs and videotapes. Previous orders have held that photographs may contain personal information of the individuals depicted in them (see, for example, Orders MO-1378 and MO-1410. See also Order M-528, where former Adjudicator John Higgins found the photographs contained personal information because they "indicate the race and sex" of identifiable individuals; and Reconsideration Order R-980036, upheld in *Attorney General of Ontario v. Holly Big Canoe, Inquiry Officer and James Doe, Requester*, Toronto Docs. 233/99 & 132/00, Consolidation No. 316/98 (Div. Ct.)). Similarly, previous orders have held that videotapes may contain personal information of the individuals seen and/or heard in them (see, for example, my Order MO-1305, as well as Orders P-1140, PO-1928 and PO-1966).

As noted above, the appellant refers to Order P-978, in which former Adjudicator Jiwan found that the identities of certain individuals (including public officials and community representatives or leaders) who had taken a public stand about performances of the musical Show Boat could not be characterized as personal information. In my view, the facts in Order P-978 are distinguishable from the circumstances of this appeal. Information about an individual's participation in a public protest is quite different from information associated with a criminal investigation, the latter clearly being more sensitive and personal in nature.

The appellant also cites the *Aubry* case, which concerns a successful action for damages arising from unauthorized publication of the plaintiff's photograph, and contains *obiter* commentary about diminished privacy rights of individuals who appear "in an incidental manner" in photographs taken in a public place. In my view, the *Aubry* case does not support the proposition that a photograph would not constitute personal information under the *Act* just because the person's appearance is "incidental" and the photograph was taken in a public place.

Rather, this determination must be made in the context of the *Act*, particularly its definition of "personal information".

Category 2 photographs and videotapes

The undisclosed Category 2 records consist of 4 videotapes and 72 photographs, as described above.

As far as the photographs are concerned, I find that most of them depict identifiable individuals, specifically the occupiers at Ipperwash on September 5-7, 1995, as well as certain OPP officers. By and large, the images in the photographs are clear, and even where the image of an individual is small, he or she is identifiable by other means, such as distinctive clothing, which is clearly visible. I have considered the appellant's submission that records do not contain personal information if there is no reasonable expectation that an individual can be identified in an obscured or otherwise unclear photograph. In Order P-230, former Commissioner Wright found that if there is a reasonable expectation that an individual can be identified from the information in a record, then the information qualifies as "personal information". In my view, none of the photographs in Category 2 are so obscured or out-of-focus that individuals could not be identified from them, or at a minimum, there exists a reasonable expectation in each photograph that one or more individuals can be identified. I find that all of the photographs depicting protestors contain recorded information about them as identifiable individuals, which qualifies as their "personal information" under section 2(1) of the *Act*.

A small number of Category 2 photographs do not depict any individuals. However, in each such instance, other than photograph DD19, they depict identifying objects, such as license plate numbers or distinctive vehicles, which, in my view, is sufficient to link them to an identifiable individual and thereby bring these records within the scope of the definition of "personal information".

I find that one photograph, DD19, does not depict any individuals. As described in the index, it consists of an aerial photograph of the outside of a camp store. In this instance, I find that no individual could reasonably be identified through linkage to any of the other information contained in the photograph. Accordingly, I find that photograph DD19 does not contain "personal information", and should be disclosed.

Photographs A1-A11 depict individual members of the OPP, or clothing that is identifiable as an OPP uniform. The appellant submits any such depictions of police officers in their employment, professional or official capacity does not constitute personal information under the *Act*. The Ministry also takes the position that the information of the police officers in the Category 2 photographs is not their personal information. The appellant is accurate when she points out that previous orders have established that information associated with individuals in their professional or official government capacity is not "about an individual" within the meaning of section 2(1) (see, for example, Orders P-1412, P-1621 and R-980015). I find that the reasoning in these orders applies to photographs A1-A11 depicting OPP officers or clothing identifiable to

the OPP officers, and that these records do not contain "personal information", and should be disclosed.

As far as the undisclosed videotapes in Category 2 are concerned, I find that they contain some of the same types of information as the photographs, for the same reasons. Specifically, I find that some portions of the videotapes depict the activities of various occupiers at Ipperwash during the time period covered by the appellant's request, and that these portions contain the "personal information" of these individuals; other portions contain identifying objects sufficient to link them to the occupiers, thereby bringing these portions within the scope of the definition of "personal information"; other portions of one videotape depict OPP officers and a health care professional discharging their professional responsibilities, which do not contain their personal information; and other portions that record activities at Ipperwash contain no "personal information".

Category 3 videotape

The only Category 3 record is a videotaped interview of an individual conducted by the OPP. It is apparent from the contents of this videotape that it was conducted in the context of the OPP's investigation into the events that took place at Ipperwash. The interviewee is identified by name and address on the tape, and her face and voice are clearly discernable. Throughout the interview, the individual describes events that took place at Ipperwash, including her "personal opinions or views" as the phrase is used in paragraph (e) of the definition of "personal information". Accordingly, I find that the one Category 3 videotape contains the interviewee's "personal information." The OPP officers and health care professional who appear on the videotape are discharging their professional responsibilities, and the videotape does not include their personal information. No individual, other than the interviewee, is identifiable from the contents of the videotape.

In summary, I find that the one Category 3 record contains the personal information of the interviewee only; that all Category 2 records depicting or otherwise identifying occupiers contain the personal information of these individuals; and that none of the Category 2 or Category 3 records contain the personal information of OPP officers or other professionals.

INVASION OF PERSONAL PRIVACY

Where records contain only the personal information of individuals other than the appellant, section 21 of the *Act* prohibits disclosure of this information unless one of the exceptions listed in the section applies.

The Ministry relies on the personal privacy exemption at section 21, including the criteria and presumption described in sections 21(2)(e), 21(2)(f), 21(2)(i) and 21(3)(b). The appellant relies on the exceptions to the exemption at sections 21(1)(a) and (f). These provisions of section 21 read as follows:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
>
> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Section 21(1)(a)

Section 21(1)(a) creates an exception to the mandatory exemption protecting personal privacy.

Category #2 photographs and videotapes

The appellant states that she has obtained written consents from certain individuals who were at Ipperwash on September 5-7, 1995, and submits, "[w]here consent has been given, the Ministry has no discretion to refuse to release the records on the basis of section 21." She submits:

> While it is the requester's position that consent may not be needed for this request to be granted, as it is unlikely that the records contain personal information, the requester nevertheless conducted a thorough investigation to identify the aboriginal protesters who were in Ipperwash Provincial Park on one or more of the days in question and who might be identifiable in the records.

During the course of this inquiry, the appellant provided me with the names of 25 individuals, together with a copy of their signed consents. She did not provide the consents to the Ministry, for reasons she explains in her representations. The appellant submits that these individuals "have every right under [the *Act*] to waive their privacy interests in these records to further public scrutiny of the OPP's actions at Ipperwash and public accountability of the OPP and the provincial government for the events of September 1995."

The appellant goes on in her representations:

> Each written consent specifically provides for the release of photos and videos taken at Ipperwash Provincial Park, from September 4 to 7, 1995, which may contain the image of the individual giving consent. Each individual expressly gives consent "as required under [the Act]" to the release of the photos and videos to the requester to assist her in making a documentary for the CBC. Accordingly, as required by Order PO-1723, the consenting parties have provided written consent to the disclosure of their personal information in the context of an access request. The requester submits that the consents enclosed at Tab 1A meet the requirements of paragraph 21(1)(a) of the *Act*.

In response to the appellant's representations, the Ministry submits:

> It is the position of the Ministry that 21(1)(a) does not apply in these circumstances. The records at issue were compiled as a result of police investigations. The test for proper consent under the Act is specific and detailed. The "consents" in this case, were not obtained by the Ministry and in reviewing the representation submitted by the appellant the consents, in some cases, were obtained by [sic] persons who just happened to be in the Park on one or more of the days in question according to their recollection of events.

In her final set of representations, the appellant responds to the Ministry's position:

> The Ministry seems to be submitting that an individual cannot consent to disclosure of his or her personal information if it was compiled as part of a police investigation. This is a misinterpretation of s. 21(3)(b) of the [the Act]. Even if the Records at issue were compiled as part of an investigation into a possible violation of law (which has not been established), s. 21(3)(b) does not "trump" the consent provision in s. 21(1)(a).

The appellant goes on to state, "[t]here is no privacy interest for the Ministry to protect where the individuals have decided to exercise their right to share their personal information with [the appellant]." She states that "it is irrelevant whether the written consent is obtained by [the appellant] or the institution", and argues that there is no reason to question the individuals' recollection of whether they were in the Park during the days in question.

In my view, the wording of section 21(1)(a) does not support the appellant's contention that the consents meet the requirements of that section. In order for consent to operate as an exception to the mandatory section 21(1) exemption, it must be in writing, and provided to the institution that has custody and control of the records containing the individual's personal information. The individual can provide this consent either directly to the institution or indirectly through this office on appeal.

The appellant is correct where she submits that a valid consent under section 21(1)(a) removes any discretion the Ministry might have to deny access to records containing the pertinent personal information. As former Commissioner Wright held in Order M-8, an appeal decided under the *Municipal Freedom of Information and Protection of Privacy Act*:

> … Where consent is given by an individual to disclose his/her personal information to which he/she is entitled to have access, and in the absence of any other exemption applying to the information, in my opinion, there is no residual discretion that can be exercised by the head to refuse disclosure of the personal information of this person. Simply stated, if the exception contained in section 14(1)(a) applies, the mandatory exemption from disclosure does not.

However, in the circumstances of this appeal, the appellant has explicitly asked that I not provide the Ministry with the names of individuals who provided her with written consents. Because the Ministry has not seen these consents and does not know which individuals have consented, I find that the requirements of section 21(1)(a) are not satisfied, and the appellant is precluded from relying on this exception.

As mentioned above, the appellant submits that the individuals who occupied Ipperwash "voluntarily took part in a public protest that was intended to attract and did attract media and public attention to their land claim." This would appear to raise the issue of whether or not the occupiers implicitly consented to the disclosure of their personal information. Previous orders of this office have found that in certain circumstances, an individual's actions can be construed as implied consent to disclosure of their personal information under section 21(1)(a) (see, for example, Orders P-439 and P-1085).

While it may be accurate to say that the individuals who occupied Ipperwash initially did so voluntarily, it does not necessarily follow that their participation in any disputes with the police can be characterized as "voluntary." The records do not arise solely out of a voluntary public protest, but instead are clearly associated with a criminal investigation. I am not persuaded, based on the representations provided by the appellant, that any individuals present at Ipperwash on September 5-7, 1995 intended their participation in a public protest to be treated as implied consent to disclose their personal information in connection with a subsequent criminal investigation. In any event, no consents, whether express or implied, have been provided **to the Ministry**, which is a requirement for the application of the section 21(1)(a) exception.

Accordingly, I find that the exception in section 21(1)(a) does not apply to the Category 2 records that remain at issue in this appeal.

Category 3 videotape

The interviewee whose personal information is contained on the one Category 3 videotape was not one of the occupiers at Ipperwash. She was not notified as an affected person by the Ministry at the request stage, and has not as yet been added as a party to this appeal.

In the circumstances, I have decided to defer my decision under section 21(1)(a) as it relates to this record, pending notification of the interviewee. I will canvass with the interviewee whether she consents to the disclosure of her personal information.

Section 21(1)(f)

Section 21(1)(f) creates another exception to the mandatory section 21 exemption, if it is established that disclosure of personal information does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy; and section 21(2) provides some criteria for the institution to consider in making the determination as to whether disclosure would represent an unjustified invasion of privacy. The Divisional Court has stated that once a presumption against disclosure under section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767]. A section 21(3) presumption can be overcome only if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption.

The Ministry relies on the presumption in section 21(3)(b) as well as the factors favouring privacy protection in sections 21(2)(e), 21(2)(f) and 21(2)(i).

Section 21(3)(b) provides that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry submits:

> The entire record at issue was compiled during the course of law enforcement investigations. The OPP conducted investigations to determine the person(s) who committed criminal offences, which were contrary to the *Criminal Code* or other statute. During the course of these types of investigations personal information is gathered in order to identify possible suspects. In this case the records were comprised of videotapes and photographs. The investigations did end in charges being laid against some person(s) identified in the records.
>
> The OPP is an agency, which has the function of enforcing and regulating compliance with a law and in these circumstances members of the police detachment as well as the criminal investigation unit conducted the investigations.
>
> The Ministry submits that the application of this section of the *Act* is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

In response, the appellant submits:

> … The Ministry has not provided any evidence to support this assertion. In his comprehensive book on Ipperwash, Peter Edwards describes the master police plan for the OPP's handling of the Ipperwash Occupation, "Project Maple", as calling for photographing and videotaping to ensure that the OPP was not falsely accused of brutality against the protesters. The requester submits that the records were created according to this plan, not to investigate possible violations of the law by the occupiers. The requester understands that none of the OPP videos and photos were entered into evidence in any of the trials resulting from the events in the Park. This suggests that they were not created for investigative purposes.

In responding to the appellant's representations, the Ministry submits:

> In order to put the records at issue into perspective, as to their sensitivity, it is important to note that the purpose for which the records at issue, in this circumstance, were compiled or created was in response to OPP investigations into possible violations of law. The Ministry has applied section 21(3)(b) to the records in light of this purpose. The Ministry has submitted a series of *Criminal Code* warrants, which were executed by the police during the course of these investigations, which serves to underline that purpose. Previous decisions by [the Commissioner's office] have stated that the absence of charges does not negate the application of sections 21(3)(b) [PO-1715 and MO-1451].

Previous orders of this office have established that in order for section 21(3)(b) to apply, the Ministry need only establish that an investigation into a possible violation of law took place and

the records were compiled and are identifiable as part of that investigation. As the Ministry indicates, the absence of charges does not negate the application of section 21(3)(b).

The appellant submits, as an alternative argument, that the Divisional Court's decision in *John Doe, supra*, was wrongly decided and that the presumption in section 21(3)(b) can be rebutted by factors in section 21(2). The appellant does not elaborate on this argument in her representations and, based on these submissions, I am not persuaded that it warrants further discussion in this order.

Having reviewed the Category 2 records and considered the representations provided by the parties, I am satisfied that the Category 2 videotapes and photographs recorded or produced by the OPP were all compiled and are all identifiable as part of an investigation into a possible violation of law. Specifically, they form part of an investigation of events surrounding the occupation of Ipperwash in September 1995 and possible criminal activity taking place in that context. Accordingly, I find that disclosure of the personal information of the occupiers contained in these Category 2 records would result in a presumed unjustified invasion of their personal privacy pursuant to section 21(3)(b) of the *Act*. None of the exceptions at section 21(4) apply, and I find that the exception provided by section 21(1)(f) has no application in the circumstances of this appeal. Therefore, subject to my discussion of section 23, I have concluded that the personal information of the occupiers qualifies for exemption under section 21 of the *Act*.

As stated earlier, I have decided to defer consideration of the one Category 3 videotape under section 21(1)(f), pending notification of the interviewee, and receipt of any representations she chooses to provide on the issue of whether disclosure of the videotape would constitute an unjustified invasion of her personal privacy.

SEVERANCE

Where a record contains exempt information, section 10(2) requires the Ministry to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)].

A number of relatively recent orders have considered the feasibility of severing information from videotapes and audiotapes. In Order PO-1928, former Adjudicator Dora Nipp found that a videotape consisting of interviews of four children could not reasonably be severed without disclosing the children's personal information. Similarly, in Order PO-1959, Adjudicator Sherry Liang found it "impracticable" to sever exempt personal information from certain audiotapes, even if one or more individuals had consented to disclosing their personal information.

As far as the Category 2 photographs that qualify for exemption under section 21 are concerned, in my view, severing the portions containing "personal information" of the occupiers would leave only background scenes that would be "worthless" or "meaningless", given the nature of the appellant's request. Therefore, I find that section 10(2) is not applicable to these records in the circumstances of this appeal.

With respect to the videotapes in Category 2, I find that the portions containing personal information of the occupiers are, for the most part, distinct from the portions depicting scenes that do not include any personal information. Although the Ministry has submitted that it does not have the technical ability to sever these videotapes, this position would appear to relate to the difficulty in severing undisclosed portions of the tape that include the various occupiers. Having carefully reviewed the remaining videotapes in Category 2, I find that creating dubs in a manner that includes only those portions that do not depict any of the occupiers or objects identifiable to these individuals would be relatively straightforward and would provide meaningful information to the appellant. Accordingly, I find that the severance obligations in section 10(2) apply to the undisclosed Category 2 videotapes and, but for my findings under section 23 below, the Ministry would be required to sever them in the manner I have indicated.

However, given my findings under section 23, it will not be necessary for the Ministry to sever any of the Category 2 videotapes.

COMPELLING PUBLIC INTEREST

The appellant submits that the "public interest override" in section 23 of the *Act* applies in this case. Section 23 reads as follows:

> 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.

I will consider the application of section 23 to all records in Category 2, but not Category 1 and Category 3, because Category 1 records qualify for exemption under section 14(1)(h), which is not subject to the public interest override, and I have decided to defer my section 21 findings for the one Category 3 videotape, pending notification of the interviewee.

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 (see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)). In Order P-1398, former Adjudicator John Higgins stated:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure,

> and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

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

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

Is there a public interest in disclosure, and if so, is it "compelling"?

The Divisional Court has provided guidance in determining whether a "compelling public interest" exists in a given case. In *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), the Court noted that, in assessing the issue of "compelling public interest", it is necessary to "… take into account the public interest in protecting the confidentiality …" of the information. In this part of my analysis, I must therefore consider both the existence of any compelling public interest in disclosing the records and any public interest in keeping them confidential.

I would note at the outset that I have already found a compelling public interest in disclosure of certain other records relating to the events at Ipperwash (see my Interim Orders P-1619, P-1620 and P-1621). Similar findings were made in Orders P-984, P-1363 and P-1409.

The appellant submits that the public interest in this matter is "so overwhelming" that a number of organizations, including the United Nations' Human Rights Committee, have called for a public inquiry. She notes that in its 2001 report on human rights abuses, Amnesty International criticized federal and Ontario authorities for failing to hold a public inquiry into the death of a protester. She submits that within Ontario, "public calls for disclosure of the facts about what happened [at Ipperwash] have continued unabated in the six years since the death of [a

protester]." The appellant cites a number of articles and editorials, a recently published book, and debates in the Legislative Assembly published in Hansard, in support of her position. The appellant further submits that disclosure of the records may resolve inconsistencies and prove or challenge certain allegations arising out of the events at Ipperwash during September 1995.

Consistent with previous orders, such as my Interim Orders P-1619, P-1620 and P-1621, I find that the media and public attention paid to the handling of the incidents at Ipperwash by the government and the OPP demonstrates a clear and ongoing public interest in various aspects relating to this matter. The sources cited by the appellant also indicate that this public interest has not subsided over time. I have no hesitation in finding that there continues to be a public interest in the disclosure of records relating to the occupation and subsequent criminal investigations of activities that took place at Ipperwash in September 1995.

In deciding whether this public interest is compelling, the following comments of former Adjudicator Higgins in Order P-1398 are an appropriate starting point:

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

In upholding former Adjudicator Higgins' decision in Order P-1398, the Court of Appeal for Ontario in *Ontario (Ministry of Finance*), *supra*, stated:

> ... in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the [adjudicator] was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

In light of the Court of Appeal's comments, I adopt former Adjudicator Higgins's interpretation of the word "compelling" in section 23.

As the appellant points out, the activities taking place at Ipperwash in September 1995 have been subject to intense public interest in the years since they occurred. In particular, calls for an inquiry into the death of a protester have been prominently featured in the media and have been the subject of debates in the Legislature. In my view, there can be little doubt that issues surrounding the events that took place at Ipperwash have "roused strong interest or attention", and that this interest has not dissipated with the passage of time. Members of the Legislature routinely pose questions to the government on various aspects of the matter; it continues to receive a significant amount of media coverage throughout the province; and, as the appellant points out, it has also been the subject of a recently published book.

On the issue of whether there is a compelling public interest in disclosure, the Ministry submits that:

> The Legislature in passing the Act intended that the privacy of individuals should be protected and determined that section 21 would be a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained.
>
> In the circumstances of the request at issue, to withhold the personal information in the responsive records is consistent with the purpose of the exemption. All records were compiled as a result of police investigations.
>
> The appellant in their representations raises, as an argument, that events at Ipperwash has been the subject of great public debate and controversy and have been the subject of great debate at Queen's Park including a call for an inquiry.
>
> The position of the Ministry is protecting the personal privacy of individuals, in this matter, as the records were compiled and identifiable as part of an investigation into a possible violation of law.
>
> ...
>
> It is the position of the Ministry, in the present matter, that the section 23 public interest override does not apply to the responsive records and even if [the Commissioner] finds that the interest override does exist it clearly would not outweigh the purpose of the section 21 exemptions taking into consideration the purpose for which the records were compiled.

The Ministry also refers to Order PO-1878, in which Senior Adjudicator David Goodis found that there was no compelling interest in disclosure of Coroner's records (should any exist), in connection with a sexual abuse investigation by the OPP, because they would be "only indirectly connected to the investigation and would not shed a significant amount of light on the manner in which the investigation has been carried out." The Ministry notes that the events at issue in Order PO-1878 were subject to police investigations, much media coverage and debates about holding a public inquiry. It is significant, however, that Senior Adjudicator Goodis did find a "compelling public interest" in the disclosure OPP records, should any exist, stating that they would "shed light on how the authorities have responded to the allegations of abuse". In the particular circumstances of that case, he found that the compelling public interest did not outweigh the privacy interest protected by section 21 of the *Act*, because "any records which may exist would reveal highly sensitive personal information about not only the subjects of the investigation, but about other involved individuals, such as victims …". In my view, Order PO-1878 does not support the Ministry's position and is, in any event, entirely distinguishable from the circumstances of this case because of the nature of the personal information that would have been contained in any records that might have existed in that case.

The Ministry's submissions on the issue of whether a compelling public interest exists do identify, by implication, the nature of the public interest in confidentiality that I must consider, based on the *Ontario Hydro* decision, referred to above. This confidentiality interest relates to

the sensitivity and integrity of criminal investigations. In my view, in the circumstances of this appeal, this interest in confidentiality does not negate the existence of a compelling public interest in disclosure. Moreover, it overlaps to a significant extent with the interest protected by the personal privacy exemption, which I will address in detail below in my analysis of whether the compelling public interest in disclosure outweighs the purpose of the exemption. I also note that the integrity of criminal investigations is an interest protected by section 14 of the *Act*, which, as I have stated previously, was not made subject to the public interest override in section 23, and the Category 1 records, which I have found to be exempt under that provision, are not part of this analysis.

In my view, there is a clear and compelling public interest in disclosure of records that deal with events that took place at Ipperwash in September 1995. Records such as those qualifying for exemption under section 21 in this appeal, which were created during the course of the occupation itself, and were the subject of criminal investigations undertaken by the OPP, are closely and directly connected to the activities that gave rise to the public's interest and, in my view, this lends support to my finding that there is a "compelling" public interest in disclosure of these records for the purposes of section 23 of the *Act*.

The only remaining issue in this appeal is whether this clearly established compelling public interest in disclosure of the otherwise exempt records is sufficient to outweigh the purpose of the section 21 exemption claim.

Does this compelling public interest clearly outweigh the purpose of the section 21 exemption?

Section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is protected except where infringements of this interest are justified. The importance of this exemption, in the context of the *Act*, is underlined by its inclusion as one of the fundamental purposes of the *Act*, as stated in section 1(b):

> The purposes of this Act are,
>
> > to protect the privacy of individuals with respect to personal information about themselves held by institutions ...

On this basis, I would conclude that the protection of individual privacy reflects a very important public policy purpose which is recognized in the section 21 exemption. However, it is important to note that the balancing exercise within section 21(2), the class-based exclusion of information from the reach of section 21 set out in section 21(4), and the inclusion of section 21 as an exemption that can be overridden by section 23 all indicate that this public policy purpose must, at times, yield to more compelling interests in disclosure identified by the legislature (Order P-1779).

Commenting generally on the personal privacy exemption under the freedom of information scheme, the authors of *Public Government for Private People: The Report of the Commission on*

Freedom of Information and Individual Privacy/1980, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations that would generally be regarded as particularly sensitive, in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature . . . the effect of the proposed exemption is to tip the scale in favour of non-disclosure" (Order MO-1254).

The appellant submits:

> The questions raised by the Ipperwash crisis are extremely serious. While the section 21 exemption is very important, the Legislature deliberately chose to make it subject to being overridden by the public interest in an appropriate case. This is such a case.
>
> As in Order PO-1779, concerns about the integrity of the criminal justice system and the appropriateness of the OPP's action outweigh the purpose of section 21. To withhold the records because they contain the personal information of the very individuals who want the truth about Ipperwash to come out does injustice not only to them, but to the purposes of the [the Act].

In its reply, the Ministry submits:

> … in this case, the records were compiled as a result of highly sensitive OPP investigations and the section 23 public interest override does not apply to the personal information discussed above in that there is no compelling public interest that clearly outweighs the purpose of the exemption.

Considerations favouring privacy protection

The Category 2 records that qualify for exemption in this appeal all fit within the presumption in section 21(3)(b) of the *Act*. In Reconsideration Order PO-1762-R, Adjudicator Laurel Cropley made the following comments about this presumption:

> In discussing how best to balance the interests in disclosure against the privacy interests of individuals about whom the information relates, the Williams Commission Report recognized that a general balancing test should be established and applied in making this determination. However, it also noted that:
>
> > personal information which is generally regarded as particularly sensitive should be identified in the statute and made the subject of a presumption of confidentiality.

> By including the category of information referred to in section 21(3)(b), the legislature has clearly identified records compiled and identifiable as part of the "law enforcement" process as particularly sensitive.
>
> ...
>
> Moreover, as I noted above, the inclusion of the presumption in section 21(3)(b) recognizes the heightened importance of protecting individual privacy in these circumstances.

I agree with Adjudicator Cropley's reasoning. The fact that all of the records under consideration here fall within the scope of the section 21(3)(b) presumption of an unjustified invasion of privacy is a significant consideration when finding the proper balance between disclosure and privacy protection.

I also recognize that a substantial degree of deference is owed to police institutions seeking to protect sensitive information gathered as part of a criminal investigation. This is another consideration in the context of this appeal, where all records under consideration were compiled by the OPP in the context of a criminal investigation. However, in my view, this consideration is taken into account primarily through the exclusion of section 14 from the scope of section 23, and also in the context of determining whether a compelling public interest in disclosure exists, as discussed above.

Considerations favouring disclosure

There is one factor, somewhat unique to the circumstances of this appeal, that, in my view, significantly reduces the seriousness and significance of the privacy issues as they relate to the various individuals who occupied Ipperwash: the fact that 25 of these individuals have given written permission for the appellant to have access to any of their personal information contained on any videotapes or photographs taken at Ipperwash during the September 4-7, 1995 time period. Although I have determined that the consents provided by these individuals are not sufficient to bring them within the scope of the section 21(1)(a) exception (which would preclude the application of the personal information exemption), in my view, these consents are strong evidence of an interest and intention on the part of the various occupiers to forego their privacy rights in order to assist the appellant in her efforts to shed light on the events that took place at Ipperwash. It is also significant to note that, having reviewed the various Category 2 records that qualify for exemption under section 21, the number of consents obtained by the appellant appears to exceed the total number of occupiers identified in the records. In my view, it is reasonable to conclude that, with one notable exception, most, if not all, of the occupiers depicted in the Category 2 records have provided the appellant with signed consents. At the very least, I am satisfied that a significant number of the occupiers have given the appellant their consent.

The content of the records themselves is also relevant to the balancing of access and privacy rights in this appeal. I have carefully reviewed all of the Category 2 records that contain

personal information. Although they meet the technical requirements of section 21(3)(b), in my view, the photographs, with some important exceptions, consist of passive scenes of various occupiers sitting or standing alone or in small groups. In no instance are police officers and occupiers included in the same photograph, and in at least one instance, an individual who provided consent to the appellant is the only person identifiable in a number of photographs.

As far as the videotapes are concerned, they contain similar types of information. One undisclosed videotape is taken from a helicopter, and is similar in nature to the two videotapes already disclosed to the appellant. It consists primarily of shots of buildings, residences, beaches, roads and trees, with some portions including groups of occupiers standing in one area of the park. No police officers are identified in this videotape. The other three videotapes are taken by hand-held cameras. One is 5 minutes in duration, and consists primarily of scenes of Ipperwash that do not depict any occupiers. A small portion of this record includes shots of two separate occupiers in passive scenes similar to those depicted in the photographs. No police officers are identified in this videotape. The second of these other videotapes is 1 minute long and consists of a passive scene of a group of occupiers and a vehicle. Again, no police officers are identified in this videotape. The final videotape consists of two parts: (1) scenes of a vehicle that would appear to have been seized by the OPP; and (2) a videotape of a police interview with one of the occupiers. This second portion of the videotape also includes a brief portion containing the personal information of another occupier, and also depicts two OPP officers and a health-care professional (which, as noted previously, is not their personal information). The two occupiers depicted in this videotape are both among those individuals who provided consent to the appellant to the disclosure of their personal information.

Findings

In weighing the compelling public interest in disclosure of the various Category 2 records against the purpose of the personal privacy exemption, I find that the public interest in disclosure outweighs the interests in privacy protection reflected in the section 21 exemption for most of the records, with certain exceptions.

One of the occupiers is depicted in photographs F11-F16, and other personal information of this individual is depicted in photographs F7-F10. The index provided to me by the Ministry identifies this individual by name. The personal information of this individual is highly sensitive, and this sensitivity is further heightened, in the case of these particular records, by their degree of relevance to the criminal investigation. As far as I can tell, this personal information is not otherwise publicly available, and I also know that this individual is not among the occupiers who provided their consent to the appellant. Given the sensitive nature of the information contained in these records, the degree of relevance to the criminal investigation, and in the absence of any of the more significant factors that serve to diminish the privacy interests of certain other occupiers, I find that the compelling public interest in disclosure of the personal information in photographs F7-F16 is not sufficient to outweigh the purpose of the section 21 exemption claim.

One other occupier is depicted in photographs F17-F20. The index provided to me by the Ministry also identifies this occupier by name. The personal information of this individual is highly sensitive, and it is clear from the content of all these photographs that the information they contain is relevant to an OPP criminal investigation. However, this individual is among the occupiers who provided their consent to the appellant. In my view, the consent in these circumstances diminishes the privacy interests of this individual significantly. On balance, and taking into account all of the relevant considerations favouring both privacy protection and disclosure, I find that the compelling public interest in disclosure of photographs F17-F20 is sufficient to outweigh the purpose of the section 21 exemption claim as it relates to this identifiable occupier.

A number of other occupiers are depicted in the remaining photographs. In a few instances these occupiers are identified by name, but in most cases they are not. Some photographs include one individual only, while groups of occupiers are depicted in others. In the case of photographs D9, D10, D13 and D15, it is not clear whether the individuals depicted in these photographs (other than the OPP officer in photograph D13) are occupiers or are associates of the OPP. In no instance other than photograph D13 are occupiers and OPP officers included together in any Category 2 photographs. In my view, the personal information of the various other occupiers in the undisclosed Category 2 photographs is not sensitive. While I accept that these photographs (with the possible exception of photographs D9, D10, D13 and D15) are technically part of an OPP criminal investigation, the content of the photographs is apparently not the primary focus of any investigation itself and does not appear to depict criminal activity. The photographs depict passive scenes of occupiers in Ipperwash (or in some instances objects that are identifiable to occupiers), and as noted above, at the very least, a significant number of occupiers consented to having their personal information disclosed to the appellant. On balance, and taking into account all of the relevant considerations favouring both privacy protection and disclosure, I find that the compelling public interest in disclosure of photographs D9, D10, D13, D15, DD1-DD18, DD20-DD23, E1-E7, E9-E12, F5, F6, and seven un-indexed photographs depicting various occupiers, is sufficient to outweigh the purpose of the section 21 exemption claim as it relates to these identifiable occupiers.

As far as the Category 2 videotapes are concerned, I have reached similar conclusions for the same reasons. While I accept that these videotapes were created by the OPP in the context of criminal investigation activity, the content of the videotapes is apparently not the primary focus of any investigation itself and does not appear to depict criminal activity. The portions of the videotapes that contain personal information consist primarily of passive scenes of occupiers in Ipperwash, and, as noted above, at the very least, a significant number of occupiers, including the individual who is the focus of the last described videotape, consented to having their information disclosed to the appellant. On balance, and taking into account all of the relevant considerations favouring both privacy protection and disclosure, I find that the compelling public interest in disclosure of all four remaining videotapes, in their entirety, is sufficient to outweigh the purpose of the section 21 exemption claim as it relates to these identifiable occupiers.

In summary, I find that the requirements of section 23 of the *Act* have been established for the Category 2 photographs D9, D10, D13, D15, DD1-DD18, DD20-DD23, E1-E7, E9-E12, F5, F6,

F17-F20, and 7 un-indexed photographs depicting various occupiers, and all 4 undisclosed videotapes. Therefore, these records should be disclosed to the appellant. I find that the requirements of section 23 have not been established for the Category 2 photographs F7-F16. Because these records qualify for exemption under section 21 of the *Act*, they should not be disclosed to the appellant.

INTERIM ORDER:

1. I order the Ministry to provide the appellant with new copies of the 2 videotapes and 62 photographs in Category 2, which the Ministry has already disclosed, at a comparable quality to the original records, at no cost to the appellant.

2. I order the Ministry to provide the appellant with an opportunity to view the original 2 videotapes and 62 photographs in Category 2 disclosed to her.

3. I order the Ministry to disclose the following records in Category 2 to the appellant: photographs A1-A11, D9, D10, D13, D15, DD1-DD23, E1-E7, E9-E12, F5, F6, F17-F20, and 7 un-indexed photographs depicting occupiers, and all 4 undisclosed videotapes. Disclosure of these records is to be made by the Ministry by **August 30, 2002**.

4. I uphold the Ministry's decision to deny access to all the records in Category 1 and photographs F7-F16 in Category 2.

5. I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 1 and 3, only upon request.

6. I remain seized of this matter, in order to deal with all outstanding issues.

Original signed by: August 9, 2002
Tom Mitchinson
Assistant Commissioner