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

Reconsideration Order PO-2063-R

Appeal PA-000370-3

Order PO-2033-I

Ministry of Public Safety and Security

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BACKGROUND:

This order sets out my decision on two reconsideration requests stemming from Interim Order PO-2033-I, issued August 9, 2002.

The Ministry of Public Safety and Security (formerly the Ministry of the Solicitor General) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media (the appellant), 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 denied access to certain responsive records, and the appellant appealed that decision to this office. After conducting an inquiry under the *Act*, I made a number of findings and issued Interim Order PO-2033-I. Specifically, I found that certain Category 2 records that qualified for exemption under section 21 of the *Act* also met the requirements of the public interest override in section 23, and I ordered that these records be disclosed. I found that other exempt Category 2 records did not meet the requirements of section 23, and I upheld the Ministry's decision to deny access to these records.

REQUESTS FOR RECONSIDERATION:

After I issued Interim Order PO-2033-I, I received separate reconsideration requests from both the appellant and the Ministry.

The Ministry's reconsideration request

The Ministry's reconsideration request is in two parts.

The first part relates to Category 2 photographs A1-A11. The Ministry takes the position that these photographs, which depict injuries suffered by certain police officers, constitute their "personal information" as defined in section 2(1) of the *Act*, and that I should have provided a Notice of Inquiry to these officers and afforded them an opportunity to provide representations on whether disclosure would constitute an unjustified invasion of their privacy before making any finding under section 21 of the *Act* (invasion of privacy) with respect to these records.

The second part of the Ministry's reconsideration request relates to all Category 2 records that I ordered disclosed under section 23 of the *Act* (public interest override), including photographs A1-A11. The Ministry submits that I failed to adequately take into account the possible "financial interest" of the appellant in being provided with access to the records before reaching my decision that they met the requirements of section 23.

The appellant's reconsideration request

The appellant's reconsideration request relates to Category 2 photographs F7-F16. I found that these records qualified for exemption under section 21 but did not meet the requirements of section 23. Accordingly, I upheld the Ministry's decision to deny access to photographs F7-F16. Based on the content of Interim Order PO-2033-I, the appellant assumes that these records may

contain the personal information of the individual who died during the Ipperwash occupation, and takes the position that I should have provided this individual's estate with notice and an opportunity to provide representations before making any finding under sections 21 and 23 of the *Act*. If the records contain the personal information of someone other than the individual who died during the Ipperwash occupation, the appellant submits that I should have notified this individual to determine whether the person would consent to disclosing his/her personal information before making my section 21 determination.

Representations Process

In response to each reconsideration request, I provided the parties with a written summary of the reasons for the request and identified the procedures for dealing with reconsideration requests outlined in this office's *Code of Procedure*. I invited the parties to provide submissions to me on the issue of whether I should reconsider those provisions of Interim Order PO-2033-I identified in each reconsideration request, and if so, on the reconsiderations themselves.

I received separate submissions from both parties on each of the two reconsideration requests. I decided to consolidate the two requests at that point, and provided each party with an opportunity to reply to the various submissions provided by the other party on the two reconsideration requests. Each party provided additional submissions by way of reply.

DISCUSSION:

SHOULD INTERIM ORDER PO-2033-I BE RECONSIDERED?

Reconsideration Policy

The Information and Privacy Commissioner has developed a policy which sets out the grounds upon which a decision-maker may reconsider a decision. The policy states:

> A decision-maker may reconsider a decision where it is established that:
>
> (a) there is a fundamental defect in the adjudication process;
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> (b) there is some other jurisdictional defect in the decision; or
>
> (c) there is a clerical error, accidental error or omission or other similar error in the decision.
>
> A decision-maker will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the decision.

Representations

The Ministry's request

Part 1: Category 2 photographs A1-A11

The Ministry points out that the section 21 exemption is mandatory, which, in the Ministry's view, imposes an inherent obligation on me to review records to determine if this exemption applies, regardless of whether the exemption was claimed by an institution. The Ministry refers to Reconsideration Order R-980023, where Adjudicator Donald Hale found that failing to notify an affected party under section 50(3) and not providing that individual with an opportunity to make submissions represented a fundamental defect in the adjudication process (paragraph (a) of the reconsideration policy).

The Ministry submits that photographs A1-A11 contain the personal information of the officers depicted in the photographs and, because these officers were not notified and provided with an opportunity to make submissions with respect to the disclosure of these records, this constitutes a fundamental defect in the adjudication process under paragraph (a).

In response, the appellant identifies the case of *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 as the leading case from the Supreme Court of Canada that outlines the limits on a tribunal's ability to reconsider its decision. Former Adjudicator Anita Fineberg made reference to the *Chandler* case in Order M-938, where she stated:

> In my view, the *Chandler* decision stands for the proposition that once a tribunal has made its final decision, it is *functus officio* and cannot reopen its proceedings unless there are indications in the enabling statute that it can do so, or where the tribunal has made a jurisdictional error, or there is an accidental or similar error in the decision. This is consistent with the [Commissioner's] policy on reconsiderations.

Based on the direction in *Chandler*, and the limited scope to reconsider as outlined in the *Code of Procedure*, the appellant takes the position that the grounds for reconsideration are not present with respect to photographs A1-A11. In support of this position, the appellant submits that the Ministry turned its mind to the issue of whether photographs A1-A11 contained "personal information" as opposed to "professional, official or government capacity information", as these two categories have been defined in past orders, and concluded that they did not. The appellant points out that the Ministry's representations in this appeal specifically state:

> It is the position of the Ministry that the records, in this case, contain the information of police officers, which is not personal information …

The appellant also points out that I considered this issue in Interim Order PO-2033-I, and found that the Ministry's position was correct. The appellant submits that where a determination has

been made that information in a record is "professional" rather than "personal", the notification requirements in the *Act* do not apply, and points to Reconsideration Order P-980015 in support of this position.

The appellant sums up her position as follows:

> The Assistant Commissioner did not commit any jurisdictional or other error in failing to give notice to the police officers pictured in photographs A1-A11, when all parties agreed that the records contained only information relating to the officers' employment, professional or official capacity, and the Assistant Commissioner upheld that conclusion. As noted in Reconsideration Order R-980015, it "would place an unreasonable burden on the Commissioner's office" to require that notices of inquiry be provided in such circumstances. [appellant's emphasis]

The Ministry's reply submissions did not deal with photographs A1-A11.

In her reply representations, the appellant submits that the duty of fairness as it relates to notice to the police officers depicted in photographs A1-A11 requires only that I turn my mind to the issue of whether there is any individual who should be notified, and refers to the portion of Interim Order PO-2033-I which confirms that I did. She reiterates that there is no duty to notify in circumstances where a determination has been made that records do not contain "personal information", and states:

> … In this case, the police officers' own employer, who would have unique knowledge of whether the information related to the employees' employment or private capacity, conceded that the records did not contain information relating to the officers in their private capacity. The Assistant Commissioner fulfilled his duty of fairness by turning his mind to the question of whether the Ministry's concession was correct. [appellant's emphasis]

Part 2: Category 2 records covered by Provision 3 of Interim Order PO-2033-I

In Provision 3 of Interim Order PO-2033-I, I ordered the Ministry to disclose a number of Category 2 records, including photographs A1-A11. The Ministry's position that I should reconsider this provision can be summed up as follows:

> The Ministry submits that, in this specific case [the Commissioner's office] in making its determination under section 23 failed to examine all relevant release interests provided by the appellant. There is uniqueness in this request in that the appellant on the one hand is strongly seeking access to the records and asking section 23 to be applied, however, the appellant does not want disclosure until certain criteria have been met due to a "financial interest". The Ministry is of the view that this creates a personal interest by the appellant not a public interest.

> This clearly creates a competing interests situation by the appellant, which the Ministry submits, should have been the subject of discussion by [the Commissioner's office] in its section 23 decision.

The appellant disputes the Ministry's position. She submits that she has no "personal interest" in the release of the records, and points out that she is a salaried employee whose compensation for working on the project to which the records relate will be the same whether the records are disclosed or not.

The appellant explains that she had requested that the details of the appeal not be published until a final determination had been made on whether the records would be disclosed in the interest of not being "scooped" by another journalist. She submits:

> Every journalist who makes a freedom of information request has a professional interest in being the first person to "break the story," particularly after spending time and money on an appeal. The purpose of the request is nonetheless to use the records for public interest purposes: to bring the information that allows scrutiny of government to the public. Contrary to the Ministry's allegations, it is not a "competing interests situation." The fact that the media generally operates on a for-profit basis does not compromise their position as "surrogates for the public" in obtaining and disseminating information about government and judicial institutions: see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. For example, in *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, the Supreme Court of Canada noted that the media could not be treated like other commercial operations, because of "the importance of their role in a democratic society."

The appellant also points out that as soon as I rejected her position and decided to publish Interim Order PO-2033-I, any competitive advantage over other journalists was lost.

Finally, the appellant submits that the Ministry's request in this regard does not fall within the scope of the reconsideration policy because it is now attempting to advance an argument that could have been made during the appeal itself. She submits that:

> The Ministry had notice of the appeal and an opportunity to make submissions, and did, in fact, make submissions on the s. 23 issue. If cases were reopened simply on the basis that counsel has come up with a new submission, there would be no finality of proceedings, contrary to the Supreme Court of Canada's decision in *Chandler, supra*.

The appellant's request: Category 2 photographs F7-F16

The appellant bases her request for reconsideration on paragraph (a) of the reconsideration policy. She submits that the failure to give an individual whose personal information is contained in a record notice of the appeal under section 50(3) and the opportunity to make

representations is a breach of natural justice and a fundamental defect in the adjudication process.

The appellant argues that it was apparent to me when considering the various records in this appeal that the individual depicted in Category 2 photographs F7-F16 was an "affected person" under the *Act*, and that I should have provided this person with notice and an opportunity to consent to disclosure or to make submissions opposing disclosure, as I had done for the individual whose personal information was contained in the one Category 3 record in this appeal.

The appellant points out that if the person depicted in the photographs is the individual who died during the Ipperwash occupation:

> … it would have been very easy for the Assistant Commissioner to identify the individuals who now represent [the deceased's] interests, and seek their consent or submissions regarding [the deceased's] privacy interests in the photographs. Considering that every other occupier consented to the release of the records to [the appellant], the Assistant Commissioner should have determined whether [the deceased's] personal representative was prepared to do the same.

The appellant submits that once she became aware, through the release of Interim Order PO-2033-I, that the photographs might contain the deceased individual's personal information, she obtained the consent of the administrator of this individual's estate, and provided me with notarial copies of the consent form and the Letters of Administration for the estate.

The Ministry's submissions on the appellant's reconsideration request deal primarily with the possible application of section 66(a) of the *Act* to photographs F7-F16 (exercise of rights of deceased person). As to whether the grounds for reconsideration are present, the Ministry submits that once a record has been found to qualify for exemption under one of the section 21(3) presumptions, consent is not a factor for consideration under section 23.

In my letter to the parties seeking reply representations, I posed certain questions concerning the potential impact of section 66(a) on the issue of whether my not notifying the personal representative of a deceased individual would be a fundamental defect in the adjudicative process, and whether consenting to the disclosure of records in this context would "relate to the administration" of the estate of a deceased person who might be depicted in the photographs. I also asked the Ministry to provide details as to whether photographs F7-F16 had been used in any criminal or civil proceedings stemming from the criminal investigations undertaken in Ipperwash in 1995, or otherwise disclosed or made publicly available. I asked the appellant to reply to the Ministry's position regarding the relationship between a section 21(3) presumption and consent.

In response to the Ministry's position on consent, the appellant submits that the Ministry made the same argument earlier in this appeal, and maintains that I rejected these arguments in Interim Order PO-2033-I.

In its reply submissions, the Ministry chose not to answer my questions regarding the use and disclosure of photographs F7-F16. It stated that the answers to these questions did not relate to the issues under reconsideration relating to section 66(a), and could not assist me in making a determination in this regard. The Ministry also pointed out that given the broad nature of my questions and the passage of time since photographs F7-F16 were created, the Ministry was not in a position to provide a definitive response regarding prior use or disclosure of these photographs.

Findings

The Ministry's request

Part 1: Category 2 photographs A1-A11

During the course of the inquiry leading to Interim Order PO-2033-I, the Ministry did not identify any personal information considerations relating to OPP officers contained in the various Category 2 records at issue in this appeal. On the contrary, as the appellant points out, the Ministry specifically stated in its representations that information about police officers was not their personal information. Although the Ministry's representations on this issue are not detailed, in making my "personal information" findings for Category 2 records in Interim Order PO-2033-I, I had assumed from the Ministry's position that any required consultations with the various OPP officers depicted in the Category 2 photographs and videotapes had taken place.

As it turns out, the Ministry apparently had not consulted with these police officers prior to the issuance of Interim Order PO-2033-I. After the order was issued, the Ministry contacted these police officers and, as stated in the Ministry's reconsideration request, the officers objected to disclosure of information that would depict the injuries they sustained during altercations that took place at Ipperwash, on the basis that this was their "personal information" and that disclosure would represent an unjustified invasion of their privacy under section 21 of the *Act*.

Section 21 is a mandatory exemption. If a record contains "personal information" as defined in section 2(1), an institution *must* deny access to this information under section 21, unless one of the exceptions to the mandatory exemption in section 21(1) are present. The fact that the Ministry did not raise the possible application of section 21 to records depicting injuries suffered by the various police officers is unfortunate but, in my view, not determinative of whether there has been a fundamental defect in the adjudication process as it relates to photographs A1-A11. I have an independent responsibility to properly consider the potential application of section 21 of the *Act* in all circumstances where this mandatory exemption could reasonably apply.

In my view, the circumstances of this case are similar, though not identical, to those that Adjudicator Hale faced in Reconsideration Order R-980023. In that case, Adjudicator Hale found that the failure to notify potential affected persons and to provide them with an opportunity to submit representations constituted a fundamental defect in the adjudication process. I have also determined that there was a fundamental defect in the adjudication process in this case, but for somewhat different reasons. As far as Category 2 photographs A1-A11 in

this appeal are concerned, I find that my failure to independently consider whether these records contained "personal information", based on the long-standing personal/professional distinction established by this office in previous orders, and if so, how any such "personal information" should be treated under sections 21 and 23 of the *Act*, constitutes a fundamental defect in the adjudication process under paragraph (a) of the reconsideration policy.

Part 2: Category 2 records covered by Provision 3 of Interim Order PO-2033-I

I find that the Ministry has not established grounds for me to reconsider the Category 2 records covered by Provision 3 of Interim Order PO-2033-I. I do not accept that the appellant has a "personal interest" of any sort in these records. Rather, she is an employed member of the media with a professional interest in pursuing her story on Ipperwash by exercising her right to request access to records under the *Act*.

As far as any "financial interest" is concerned, I accept that the appellant works for a news-gathering and reporting organization, and that these organizations, to some extent, compete in the commercial marketplace. In my view, this is self-evident to any adjudicator conducting an inquiry under the *Act* in response to any appeal by an appellant who represents a media outlet. It is also obvious that the appellant, like any other investigative journalist, wants her employer to benefit from the results of her investigation. These inherent considerations were before me when I made my decisions in Interim Order PO-2033-I, and I took them into account in balancing the various considerations favouring both privacy protection and disclosure under section 23 of the *Act*.

However, there was one unique aspect to this appeal. During the course of my inquiry leading to Interim Order PO-2033-I, the appellant made the unusual request that I restrict publication of my order. Although the reason for her request was clearly to avoid being "scooped" by another media outlet, I accept that the rationale for avoiding a "scoop" links back, in part, to the financial and competitive interests of the appellant's employer. That being said, any "financial interest" in this regard was before me at the time I considered the application of section 23 to the various Category 2 records, and when I decided to reject the request to delay publication, I implicitly determined that the relevance of any potential "financial interest" was outweighed by other considerations favouring disclosure, as described in detail in Interim Order PO-2033-I. Moreover, even if a financial interest existed, it would not serve to reduce the magnitude of the public interest in disclosure.

In my view, all necessary steps of the adjudicative process were followed in reaching my decision on the treatment of the various Category 2 records covered by Provision 3 of Interim Order PO-2033-I. Specifically, I find that there was no defect in the process leading to my finding in Provision 3 based on the reasons put forward by the Ministry, and no fundamental defect of any sort. Accordingly, I reject the Ministry's reconsideration request as it relates to the various Category 2 records covered by Provision 3 of Interim Order PO-2033-I, with the exception of photographs A1-A11 already dealt with above.

The appellant's request

Category 2 photographs F7-F16

According to the Ministry's index, Category 2 photographs F7-F16 were taken by the OPP on September 7, 1995 and depict the individual who died during the course of the Ipperwash occupation, after his death. All of these photographs contain very sensitive "personal information" of the deceased individual as defined in section 2(1) of the *Act*.

The essence of the appellant's argument is that by failing to notify the administrator of the deceased individual's estate prior to making my decision under section 23, I denied the estate representative the opportunity to consent to disclosure on behalf of the deceased, and that this constitutes a fundamental defect in the adjudicative process. In the appellant's view, "the consent of [the deceased's] personal representative justifies the release of photographs F7-F16". She submits that the deceased would have had the right pursuant to section 21(1)(a) to consent to the disclosure of his personal information, and that section 66(a) entitles his personal representative to exercise this right after death. She further submits:

> The personal representative's consent meets the requirements in s. 66(a) that the exercise of the deceased's rights "relates to the administration of the individual's estate." The personal information in photographs F7-F16 may be relevant to the litigation brought on behalf of [the deceased's] estate; for example, they may provide evidence of [the deceased's] injuries. The personal representative does not know what is in the records, or even whether they actually are of [the deceased], so it would be impossible for him to establish precisely how they relate to the ongoing litigation. However, their possible relevance is sufficient to make his consent to their public disclosure "relate[d] to the administration of [the deceased's] estate." Accordingly, ss. 21(1)(a) and 66(a) of the *Act* apply, and the records should be disclosed.

In Order M-1075, I reviewed the scope of the access rights of a personal representative under section 54(a) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent provision to section 66(a) of the *Act*, where I stated:

> The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the *Act*, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.
>
> In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) [and section 66(a)]

> should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

Applying this reasoning to the facts before me in this appeal, I find that sections 21(1)(a) and 66(a) are not relevant in the circumstances. Although it would appear that the person named as administrator of the deceased's estate would qualify as a "personal representative" for the purposes of section 66(a) if he were seeking access to personal information of the deceased individual under the *Act*, he in fact is not the requester in this appeal. In my view, that fact alone eliminates any potential application of section 66(a). I also find that the consent provided to the appellant by the estate administrator has no bearing on the application of section 66(a). Section 66(a) creates a narrow set of rights accorded to a specific category of individuals who have been given responsibility by the courts to administer estates. These rights are specific to a "personal representative" or that individual's counsel or agent. While the personal representative in this case may support the appellant's request, the evidence before me indicates that the appellant is not acting as agent for the personal representative in any estate-related capacity.

As I made clear in Order M-1075, the rights of an estate administrator are narrowly defined. If the requirements of section 66(a) are present, the appointed administrator is entitled to exercise certain estate-based rights on behalf of the deceased. However, this section does not give the administrator broad rights to stand in the place of the deceased for the purposes of providing consent under section 21(1)(a) of the *Act*. As section 2(2) makes clear, a deceased individual retains privacy rights until 30 years following death. Although it has been determined in past orders of this office that the passage of time following death can serve to diminish the weight accorded to these privacy rights when balanced, in certain appropriate circumstances, against other competing interests under section 21(2) of the *Act*, there is no statutory authority that would enable anyone, including an estate administrator, to consent on behalf of a deceased individual to disclosure of personal information outside the narrow context of section 66(a).

Accordingly, I find that my failure to notify the administrator of the deceased's estate before making my findings regarding photographs F7-F16 does not represent a fundamental defect in the adjudication process. The purpose of the appellant's request does not relate in any way to the administration of the deceased's estate, and the consent of the estate administrator is irrelevant to my decision regarding the application of sections 21 and 23 of the *Act* to these records.

WHAT IS THE APPROPRIATE REMEDY?

Introduction

I found above that the only basis on which my decision should be reconsidered is the fundamental defect in the adjudication process as it relates to Category 2 photographs A1-A11. I will now reconsider my decision in Interim Order PO-2033-I as it relates to these records.

Personal information

Section 2(1) of the *Act* defines "personal information", in part, as information about an identifiable individual, including, but not limited to, a number of specific types of information listed in the definition.

The Ministry takes the position that Category 2 photographs A1-A11 contain the personal information of the depicted officers. It submits that "these records do not depict officers engaged in their employment responsibilities and positions, but are clearly personal in nature as defined within the definition section of personal information in section 2(1) of the *Act*". The Ministry points out that the photographs:

> … relate to injuries suffered by the officers and is their personal information and clearly distinguishable from records ordered released which depict the normal execution of their duties. This type of information is the personal information of the officers. It does not constitute the officers' employment responsibilities or position.

The appellant submits that the photographs do not contain the personal information of the police officers. She acknowledges that an individual's "employment history" constitutes personal information, but maintains that discrete incidents occurring to an individual in the course of employment are not. She also submits:

> … it appears from the Interim Order [PO-2033-I] that in some of the photographs in issue, only the officer's clothing is depicted. Unless the officer's name is on the clothing or the clothing otherwise identified him or her, the pictures would not even reach the threshold of being about an identifiable individual: s. 2(1) of [the *Act*]. [appellant's emphasis]

Photographs A1-A11 depict OPP officers and, as identified in the Ministry's index, they were taken on September 7, 1995 while these officers were discharging professional responsibilities at Ipperwash. OPP uniforms are identifiable in some of the photographs, which supports the fact that the officers were performing their job duties when the injuries depicted in the photographs occurred.

Previous orders have determined that in order to qualify as "personal information", the fundamental requirement is that the information must be "about an identifiable individual" and not simply associated with an individual by name or other identifier.

Adjudicator Donald Hale dealt directly with the personal/professional distinction in Reconsideration Order R-980015. He stated:

> The distinction between personal information and other information associated with an identifiable individual has also been considered by the Commissioner in the context of information relating to an individual's professional, employment or

> official government capacity in both public and private sector settings. The Commissioner's orders have established that, as a general rule, a record containing information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or a private sector setting, is not the individual's personal information simply because his or her name appears on the document.

However, there are instances where information generated in the employment context does qualify as "personal information" for the purposes of the *Act*. As Adjudicator Hale points out:

> Most of the Commissioner's decisions dealing with the personal versus professional capacity distinction have involved records generated in a government employment setting. In many cases, records will contain information specifically enumerated in the definition of personal information. Letters of application for employment with an institution and resumes containing educational and employment history are "about" the individual to whom they relate, and also fall within paragraph (b) of the definition (Orders 11 and M-7). Information may not fall clearly within an enumerated class under the definition, but will still be considered to be the personal information of an identifiable individual.
>
> An early example is found in Order 20 where the issue was whether interview rating sheets and data entry test results for candidates in a job competition were considered personal information. The Commissioner did not accept the argument that the data entry test results reflected the "views or opinions of another individual about the individual" within the meaning of paragraph (h) of the definition. Nevertheless, this was found to be "recorded information about an identifiable individual", and satisfied the opening words of the definition. A wide range of employment or work-related information is captured by the definition of personal information, including records relating to such things as job competitions (Orders 11, 20, 43, 97, 99, 159, 170, P-222, P-230, P-282, M-7, M-99 and M-135), information generated in the course of investigations of improper conduct or disciplinary proceedings (Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122), and specific details of individual employment arrangements with an institution (Orders 61, 170, 183, P-244, P-380, P-432, M-18, M-23, M-26, M-35, M-102, M-129 and M-141).

In Order PO-1772, I dealt with, among other things, records related to altercations between employees and prisoners in a correctional facility. In that order I made the following finding:

> Some of the records contain information which describes injuries suffered by individual Correctional Officers as a result of their altercation with the appellant. I find that this information is properly characterized as "about" the employees in a personal sense, and qualifies as their personal information for the purposes of section 2(1).

In my view, the same reasoning applies to any of photographs A1-A11 that contain information relating to identifiable individuals. Photographs A1-A11 all depict injuries suffered by individual OPP officers as a result of altercations with occupiers at Ipperwash. Although sustained during the course of discharging their professional responsibilities, in my view, the injuries themselves are personal in nature, and as long as they are identifiable to specific OPP officers, I find that these photographs are accurately characterized as being "about" the individual OPP officers in a personal sense.

I accept the Ministry's position that all 11 photographs depict OPP officers. However, having carefully reviewed these photographs, I find that photographs A3, A4, A5, A8 and A11, considered individually, do not contain information that is identifiable to any individual officer. As such, these photographs do not meet the definition of "personal information" in section 2(1) of the *Act*. As far as the remaining photographs are concerned, I find they contain information that is identifiable to a specific OPP officer. However, in my view, all of them can easily be severed in a way that would render the remaining portions of the photographs non-identifiable.

I find that only the identifiable portions of photographs A1, A2, A6, A7, A9 and A10 contain the "personal information" of the individual OPP officers. All other portions of these photographs, as well as photographs A3, A4, A5, A8 and A11 in their entirety, do not contain "personal information" and should be disclosed to the appellant. I will provide photocopies of photographs A1, A2, A6, A7, A9 and A10 to the Ministry with its copy of this order that identify the portions that should be severed and withheld in order to render the remaining portions non-identifiable.

Invasion of privacy

In its reconsideration request, the Ministry states that it contacted the OPP officers depicted in photographs A1-A11, and that they object to the disclosure of their personal information.

For the reasons outlined in Interim Order PO-2033-I for other Category 2 records that contain personal information, I find that the personal information in photographs A1, A2, A6, A7, A9 and A10 was compiled and is identifiable as part of an investigation into a possible violation of law, specifically possible criminal activity taking place in the context of the Ipperwash occupation in 1995. Accordingly, I find that disclosure of the personal information of the OPP officers severed from photographs A1, A2, A6, A7, A9 and A10 would result in a presumed unjustified invasion of their privacy pursuant to section 21(3)(b) of the *Act*.

Because disclosing the portions of these photographs that would render them identifiable would reveal information about the injuries sustained by the OPP officers, I also find that this personal information would fall within the scope of the presumption in section 21(3)(a) of the *Act*, which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > relates to a medical … condition;

None of the exceptions at section 21(4) apply. Accordingly, I find that the exception provided by section 21(1)(f) has no application with respect to the portions of Category 2 photographs A1, A2, A6, A7, A9 and A10 that contain personal information of the OPP officers, and these portions qualify for exemption under section 21 of the *Act*.

Public interest override

In Interim Order PO-2033-I, I determined that there was a public interest in disclosing records relating to the Ipperwash occupation. I found:

> 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 Interim Order PO-2054-I, issued after Interim Order 2033-I, I dealt with a different request for access to Ipperwash-related records. In considering whether the public interest in disclosing certain exempt records in that appeal was "compelling" for the purposes of section 23, I made the following statements that, in my view, are relevant in the context of my consideration of Category 2 photographs A1, A2, A6, A7, A9 and A10:

> Quite clearly, there is a well-established compelling public interest in disclosing records concerning the events that took place at Ipperwash in September 1995. However, it does not necessarily follow that this compelling public interest extends to any and all records or information that is in any way connected to these events. For example, the public interest in disclosing information that is only peripherally connected to the occupation itself, information already widely known or otherwise readily available to the public, or information created a significant time before or after the termination of the occupation may not be compelling, depending on their content and relationship to the actual incidents of September 1995. In my view, the information contained in each record must be examined to determine whether there is a compelling public interest in its disclosure, and the nature of the public interest may vary depending on the circumstances.

In accordance with the provisions of Interim Order PO-2033-I and this order, the appellant will be given access to a large number of records and portions of records relating to events that took place at Ipperwash during the time period covered by her request. As far as photographs A1-A11 are concerned, she will receive a copy of photographs A3, A4, A5, A8 and A11 in their entirety, and also those portions of photographs A1, A2, A6, A7, and A10 that depict the actual injuries incurred by the OPP officers during their altercation with various occupiers. The only information not disclosed to the appellant is the identities of the OPP officers and an injury to the

lip of the police officer in photograph A9 that, in my view, cannot be disclosed without revealing information about the injury that would also identify the officer. The Ministry has indicated that these officers object to the disclosure of their personal information, and I have determined that the withheld portions of photographs A1, A2, A6, A7, A9 and A10, if disclosed, would bring these records within the scope of two presumptions in section 21(3), each of which is designed to protect categories of personal information that the legislature has deemed to be more sensitive in nature. In the circumstances, I find that the level of disclosure provided to the appellant through the provisions of this order and Interim Order PO-2033-I is sufficient to address the public interest considerations relating to these records, and I find that there is no "compelling" public interest in disclosure of the remaining portions of photographs A1, A2, A6, A7, A9 and A10 in the circumstances.

Conclusion

I find that photographs A3, A4, A5, A8 and A11 and the severed portions of photographs A1, A2, A6, A7, A9 and A10 do not contain "personal information" and should be disclosed. In addition, I find that the remaining portions of photographs A1, A2, A6, A7, A9 and A10 contain "personal information" of identifiable OPP officers; that disclosure of this personal information would constitute a presumed unjustified invasion of their privacy under section 21 of the *Act*; and that there is no compelling public interest in disclosing this personal information for the purpose of section 23 of the *Act*.

ORDER:

1. I hereby rescind Provision 3 of Interim Order PO-2033-I and replace it with the following:

   I order the Ministry to disclose the following records in Category 2 to the appellant: photographs A3, A4, A5, A8, A11, D9, D10, D13, D15, DD1-DD23, E1-E7, E9-E12, F5, F6, F17-20, and 7 un-indexed photographs depicting occupiers, all 4 undisclosed videotapes, and the portions of photographs A1, A2, A6, A7, A9 and A10 that do not contain "personal information". I have attached photocopies of photographs A1, A2, A6, A7, A9 and A10 with the copy of this order sent to the Ministry that identify the portions that do not contain "personal information" and should be disclosed. Disclosure of these records is to be made by the Ministry by **November 18, 2002**.

2. I hereby rescind Provision 4 of Interim Order PO-2033-I and replace it with the following:

   I uphold the Ministry's decision to deny access to all the records in Category 1, photographs F7-F16 in Category 2, and all portions of Category 2 photographs A1, A2, A6, A7, A9 and A10 that contain "personal information" and are not covered by Provision 3 of Interim Order PO-2033-I, as amended.

3. I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1 of this order.

Original signed by: November 6, 2002
Tom Mitchinson
Assistant Commissioner