



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER PO-2056-I**

**Appeal PA-000370-3**

**Ministry of the Solicitor General**



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This interim order disposes of some of the remaining issues in appeal PA-000370-3. It follows from my previously issued Interim Order PO-2033-I in this same appeal, issued on August 9, 2002.

## **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 (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. Some findings related to one specific record, referred to in that order as "the Category 3 videotape". This record consists of 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.

In Interim Order PO-2033-I, I found that the Category 3 videotape contained "personal information" as that term is defined in section 2(1) of the *Act*. Specifically, I found:

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.

Normally, once a finding is made that a record contains "personal information", the next step is to determine whether that information qualifies for exemption under the mandatory personal privacy exemption in section 21 of the *Act*. However, in this case, I decided to defer my consideration of this exemption because the interviewee had not been notified. In this regard, I stated in Interim Order PO-2033-I:

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 decided to defer my decision under section 21, pending notification of the interviewee, and receipt of any representations she chose to provide.

The appellant maintains that, even if I find that the Category 3 videotape qualifies for exemption under section 21, the public interest override in section 23 should apply to this record. Because I was not in a position to make my finding under section 21 for this record, I also decided in Interim Order PO-2033-I that I would defer my consideration of section 23, pending notification.

Accordingly, after issuing Interim Order PO-2033-I, I sent a Supplementary Notice of Inquiry to the interviewee (the affected party) outlining the facts and issues relating to the Category 3 videotape and asking for representations from her on the following issues:

- Does she consent to disclosing her personal information to the appellant?
- If not, and if I find that disclosing her personal information would constitute an unjustified invasion of her privacy, would the “public interest override” in section 23 apply to the videotape?

I also provided the affected party with a copy of the representations previously submitted to me by the appellant and the Ministry on the section 23 issue.

At the same time, I sent a Supplementary Notice of Inquiry to the Ministry, asking for additional information concerning the Category 3 videotape.

The Ministry and affected party both submitted representations. I then sent the Supplementary Notice to the appellant, together with a copy of the Ministry’s representations and a summary of the affected party’s representations. The appellant provided representations in response, which were in turn shared with the Ministry and the affected party. Neither the Ministry nor the affected party submitted reply representations.

## **RECORD:**

The only record at issue in this appeal is a videotaped witness statement of an interview conducted by the OPP. It was recorded on the morning of September 7, 1995, and is approximately 47 minutes in length.

## **DISCUSSION:**

### **Personal information/invasion of privacy**

I determined in Interim Order PO-2033-I that the Category 3 videotape contains the personal information of the affected party only. Where records contain only the personal information of individuals other than an appellant, section 21 of the *Act* prohibits disclosure of this information unless one of the exceptions listed in the section applies.

In claiming section 21 as the basis for denying access to the Category 3 videotape, the Ministry relied on the criteria and presumption described in sections 21(2)(e), 21(2)(f), 21(2)(i) and

21(3)(b). The appellant relied on the exceptions to the exemption described in sections 21(1)(a) and 21(1)(f).

### **Section 21(1)(a)**

Section 21(1)(a) is an exception to the mandatory personal privacy exemption that reads 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;

In her representations, the affected party indicated that she does not consent to the disclosure of her personal information. Accordingly, the exception in section 21(1)(a) of the *Act* does not apply to the Category 3 videotape.

### **Section 21(1)(f)**

Section 21(1)(f) is another exception to the mandatory personal privacy exemption that reads:

- (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
  - (f) if the disclosure 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) (See *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 in disclosing the personal information in the record clearly outweighs the purpose of the section 21 exemption.

The Ministry submits that the personal information in the Category 3 videotape falls within the scope of the section 21(3)(b) presumption, which provides:

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;

As outlined in Interim Order PO-2033-I, the Ministry submits:

The entire record at issue [including the Category 3 videotape] 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 her initial representations on this issue, the appellant submitted:

... 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 these representations, the Ministry submitted:

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).

In considering the application of section 21(3)(b) to the various Category 2 records at issue in this appeal, I made the following findings in Interim Order PO-2033-I:

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*.

I make the same finding with respect to the Category 3 videotape, for the same reasons. It was compiled by the OPP and is identifiable as part of an investigation into a possible violation of law in the context of events surrounding the Ipperwash occupation in September 1995. Accordingly, it falls within the scope of section 21(3)(b) of the *Act*.

In her representations, the affected party makes reference to the factor in section 21(2)(e) (exposed unfairly to pecuniary or other harm). However, as stated above, once a presumption has been established, it cannot be rebutted by one or a combination of factors under section 21(2) (*John Doe, supra*).

None of the exceptions at section 21(4) are present, so the exception provided by section 21(1)(f) has no application in the circumstances. Therefore, subject to my discussion of section 23, I have concluded that disclosure of the affected party's personal information in the Category 3 videotape would constitute an unjustified invasion of her privacy under section 21 of the *Act*.

### **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.

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.

### **Is there a public interest in disclosure, and if so, is it “compelling”?**

In Interim Order PO-2033-I, I outlined the positions put forward by the Ministry and the appellant on the issue of whether there was a compelling public interest in disclosing the various videotapes and photographs in this appeal. I will not repeat that discussion here, and would refer the parties to that previous order for a detailed description of the arguments and my findings.

In response to my Supplementary Notice of Inquiry on the Category 3 videotape, the affected party stated that she believes there is no compelling public interest in releasing her personal information in the videotape because disclosing the information would not resolve any outstanding issues.

In her supplementary representations, the appellant reiterated her position that there is a compelling public interest in disclosing the Category 3 videotape, and relied on my discussion in Interim Order PO-2033-I, where I found that there was a compelling public interest in disclosing other records compiled by the OPP in the context of the Ipperwash investigation.

The Ministry also provided representations on the Category 3 videotape in response to the Supplementary Notice. It confirmed that this record was not used in the context of any criminal or civil proceedings stemming from the OPP investigation undertaken at Ipperwash in 1995, and also pointed out that the affected party had been subpoenaed as a witness in criminal proceedings, but not called to give evidence.

In response to this point, the appellant stated:

Moreover, according to the submissions made by [the Ministry] in response to the Supplementary Notice of Inquiry, [the affected party] was subpoenaed in criminal proceedings relating to Ipperwash, and yet the videotape of her statement was never disclosed to defence counsel. This admitted breach of the Crown's disclosure obligations under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, makes the public interest in the videotape all the more compelling.

As far as the appellant's representations on the *Stinchcombe* case are concerned, I find that they are not relevant in the context of determining whether there is a compelling public interest in disclosing the Category 3 videotape. Any common law disclosure requirements that exist in the context of criminal or civil proceedings apply only with respect to the parties in those proceedings, and not to a third party such as the appellant, and not in the context of proceedings under the *Act*.

Based on the various representations submitted in response to the Supplementary Notice of Inquiry, I am not persuaded that I should depart from my reasoning in Interim Order PO-2033-I on the issue of whether there is compelling public interest in disclosing the various records at issue in this appeal. I find that all of the reasoning from that order relating to the various Category 2 records applies equally to the Category 3 videotape, including the following statement included at the end of my findings in Interim Order PO-2033-I:

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 is whether this clearly established compelling public interest in disclosure of the otherwise exempt Category 3 record is sufficient to outweigh the purpose of the section 21 exemption.

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

I outlined the purpose of the section 21 exemption in Interim Order PO-2033-I, and refer the parties to that order rather than repeating the discussion here.

**Considerations favouring privacy protection**

In responding to the appellant's section 23 representations at an earlier stage of this appeal, the Ministry provided submissions that identify a consideration favouring privacy protection, specifically the mandatory nature of the section 21 exemption claim and the fact that the records



at issue in this appeal were compiled in the context of a sensitive criminal investigation. The Ministry submitted:

The drafters of [the Williams Commissioner report] indicated that the legislation take into account situations where there is an undeniable compelling interest and where there should be a stronger balancing of privacy interests, and situations where there is a particularly sensitive matter, and when the information should be made the subject of a presumption of confidentiality. As the request becomes more sensitive in nature the effect would be on balance to take a position in favour of non-disclosure.

The Ministry then makes reference to Order PO-1878, where Senior Adjudicator David Goodis decided not to apply section 23 to records at issue in that appeal. The Ministry then states:

Section 21 itself embodies the principle of a balancing of the rights of privacy to which in Order P-1363 the Commissioner said:

Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

The Ministry submits in the circumstances of this request, to withhold the personal information in the record is consistent with the purpose of the exemption.

We submit that it is an important consideration that the exemption contained in section 21 is mandatory. As the Commissioner said in Order P-568:

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

The Ministry further submits that the Legislature in passing the *Act* intended that the privacy of individuals should be protected by making this exemption mandatory. It is noteworthy that the Legislature passed subsection 21(4), which takes certain information to which the Legislature intended the public should have access out of the section 21 exemption.

The Ministry submits that, 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.

In Interim Order PO-2033-I, I found that certain considerations favouring privacy protection were present with respect to the various Category 2 records. I stated:

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.

I find that these same considerations apply to the Category 3 videotape. As identified by the Ministry and also outlined in my findings in Interim Order PO-2033-I, the presumptions in section 21(3) recognize that certain categories of personal information are more sensitive than others. The information contained in the Category 3 videotape falls within the scope of the section 21(3)(b) presumption, which is a relevant consideration in assessing the weight accorded to the privacy interest in this information. However, as I pointed out in my discussion of this

presumption in Interim Order PO-2033-I, above, the significance of this presumption, which deals with the law enforcement context, is tempered to some extent by the exclusion of the section 14 law enforcement exemption from the coverage under section 23. In my view, it is also relevant to the section 23 analysis that the criminal investigation took place more than seven years ago, and that all criminal charges stemming from the investigation are complete.

Taking all of these factors into account, I would accord the privacy protection considerations associated with the fact that the Category 3 videotape qualifies under the mandatory section 21 exemption and was compiled as part of a law enforcement investigation moderate weight in the circumstances of this appeal.

In her representations, the affected party also points to considerations that favour privacy protection, specifically the factor in section 21(2)(e). She states that she is concerned both for her personal safety and that of her family, and about a risk of damage to her property. She also submits that she provided her videotaped statement as part of an investigation out of her duty as a citizen to provide the police with information that she witnessed, and that she does not wish to be exposed to media attention as a result of the disclosure of the videotape. The fact that the affected party did not consent to disclosing her personal information and has expressed concerns for personal safety and property damage are valid considerations for me to take into account in the circumstances of this appeal. However, these considerations are tempered to some extent by the fact that the personal information was gathered in the context of providing a witness statement to the OPP. In my view, it is reasonable to assume that the affected party, who explains that she provided the statement out of a sense of civic responsibility, would have known that she could be called upon to provide evidence as a witness in criminal proceedings stemming from events that took place at Ipperwash, and that her identity and her evidence as reflected on the Category 3 videotape would not necessarily have remained private and confidential. Regarding her stated concerns for personal safety and property damage, having carefully reviewed the Category 3 videotape and considered this record in the context of other records and issues in this appeal, I am not convinced that the harms she fears will come to pass. I am unable to outline my reasons for making this assessment in greater detail without unduly compromising the affected party's privacy.

Taking all of the various factors relating to the affected party into account, I would accord the privacy protection considerations in this regard moderate-to-high weight in the circumstances.

### **Considerations favouring disclosure**

The considerations favouring disclosure of the Category 3 videotape are not the same as those that were relevant in dealing with the Category 2 records. Specifically, the affected party was not one of the occupiers at Ipperwash, so the consents of various occupiers provided to me by the appellant are not relevant considerations with respect to the Category 3 videotape.

In addition to her submissions made at an earlier stage of this appeal (some of which are reiterated in her most recent representations), the appellant provided the following representations in response to the Supplementary Notice of Inquiry specifically related to the Category 3 videotape:

It is relevant in this regard that the affected [party] could not have known at the time she gave her statement that the Crown would fail to comply with its *Stinchcombe* obligations and disclose the videotape. The fact that the Crown failed to meet its obligation to disclose her statement cannot increase the privacy interests of the affected [party]. The videotape should have been disclosed during the criminal proceedings and should be disclosed now.

Finally, in the alternative, even if the identity of the witness and/or some of the information recorded on the videotape falls within the s. 21 exemption and that exemption is not overridden by s. 23 of [the *Act*], the Appellant submits that there is a duty to sever the record. For example, the witness' face on the videotape could be obscured, or disclosure could be limited to the audio portion of the record that describes what she saw and heard at Ipperwash.

For the same reasons outlined above in my discussion of the "compelling public interest" component of section 23, I find that the appellant's arguments regarding the *Stinchcombe* case have no bearing on my determination of the proper balance between disclosure and privacy protection under section 23 of the *Act*.

In her earlier representations, the appellant made submissions on section 23 that identify considerations that favour disclosure of the records at issue in this appeal, including the Category 3 videotape. She submitted:

The criminal cases arising from the events at Ipperwash have not fully discharged the public interest. Many significant questions about what happened in the Park remain unanswered. ...

Indeed, the decisions in the criminal cases reinforce the existence of inconsistent factual accounts of what happened in the Park. For example, the judges in the two reported cases dealing with Stoney Point band members who were charged with assault with a weapon (a motor vehicle) described the events of September 6, 1995, very differently. Both of the accused testified that they had driven out of the Park to assist [a named individual]. In *R. v. George*, the Court described the incident involving [the named individual] as follows:

As the [OPP] unit was moving backwards a number of the park occupants, armed with sticks and rocks, left the park and proceeded towards the officers. Sergeant Lacroix ordered the officers into a "full formation punch out." A massive "shield to stick fight" between the officers and occupants then took place. [The named individual] clashed directly with Sgt. Lacroix and shattered his shield with a pole. [The named individual] was hit by Sgt. Lacroix in his shoulder area and was then physically restrained by the arrest squad. The other occupants eventually retreated into the park.

In contrast, the trial judge in *R. v. N.C.* described the same incident as follows:

Prior to the arrest of [the named individual], Sergeant Lacroix testified that a person was making a speech to the officers almost in a scripted fashion to the effect that this is the land of our forefathers and you are desecrating it. After the arrest of [the named individual] he was taken to the hospital emergency room and treated by Doctor Allyson Marr. Doctor Marr testified that [the named individual] has suffered 28 areas of blunt trauma as well as a cut requiring sutures, the cut being to his head.

[The named individual] testified that he was knocked to the ground backwards, started to see stars, but soon lost consciousness. He testified as to being kicked in the head, stomach and crotch and clubbed all over his body. He further testified that on several occasions he had said: "I give up." He indicated that he was endeavouring to effect a peace between the natives and the police force and his purpose in addressing the police was to engage them in dialogue.

I find [the named individual] to be a credible witness and I accept his evidence.

The records in issue in this inquiry may be able to resolve the apparent inconsistency between these two accounts of the facts.

Other examples of allegations that might be proven or challenged by the records include: whether the protesters fired weapons on the day before [a second named individual] was shot, whether the OPP made racial slurs or threats against the occupiers, whether the OPP hindered the Stoney Point people from getting medical attention for [the second named individual] and others who were injured on September 6, whether the information gathered by the OPP justified more serious charges against [a third named individual] than those laid by the Special Investigations Unit. As was pointed out in Order P-1409, whether the actions of the OPP were appropriate or not, it is enough that serious questions have been raised. 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 as case.

In my view, the appellant has made a strong and convincing case for the disclosure of the Category 3 record, based on the serious and long-standing public demands for information that would shed light on what happened in Ipperwash during the time of the occupation, and would help clarify uncertainties that remain in the minds of members of the public. The significance of this factor favouring disclosure is particularly strong in this case, because the Category 3 videotape contains information that is directly related to the activities that give rise to the public's interest. It was recorded on September 7, 1995, during the course of the OPP

investigation, the day after the incident in Ipperwash that resulted in the death of one of the occupiers. It also represents an independent perspective on events taking place at Ipperwash during this crucially important time period.

Taking these factors into account, I would accord the considerations favouring disclosure a very high weight in the circumstances.

### ***Findings***

I must now balance the various considerations favouring both privacy protection and disclosure. If the factors favouring disclosure clearly outweigh those favouring privacy protection, then I will order that the Category 3 videotape be disclosed; otherwise, section 23 will not apply and the record will be exempt from disclosure under section 21.

Having carefully considered the moderate and moderate-to-high weight accorded to the considerations favouring privacy protection, and the very high weight accorded to the considerations favouring disclosure, I find that the compelling public interest in disclosing at least some of the contents of the Category 3 videotape clearly outweighs the purpose of the personal privacy exemption in the circumstances. However, I have decided that there is a way to balance the competing interests that relate to the Category 3 record through severance of the record. Specifically, I find that the compelling public interest in disclosing the contents of this record can be satisfied through disclosure of only the audio and not the video portion of the videotape. As far as the audio portion is concerned, I find that the first approximately six minutes of the tape, where the affected party identifies herself by name and address, the OPP officers outline the process of providing evidence, and the affected party takes her oath, need not be disclosed in order to satisfy the compelling public interest; nor is the disclosure of the first names of two other individuals provided by the affected party at five specific spots on the tape necessary for this purpose.

Therefore, I find that the requirements of section 23 have not been established for the video portion of the Category 3 videotape, as well as for the first approximately six minutes of the tape (i.e. up to the time code 8:52:38) and the first names of two individuals found at time codes 9:19:46, 9:21:22, 9:29:30, 9:29:42 and 9:29:51. I find that all other parts of the audio portion of the Category 3 videotape meet the requirements of section 23 of the *Act*, and should be disclosed to the appellant. I will attach a copy of the audio portion of the Category 3 videotape with the copy of my order sent to the Ministry, which identifies the parts that meet the requirements of section 23 and should be disclosed.

### **INTERIM ORDER:**

1. I order the Ministry to disclose the audio portions of the Category 3 videotape record that meet the requirements of section 23 of the *Act*, as described in the body of this order, by providing the appellant with one copy of the audiotape I have provided to the Ministry with its copy of this interim order. Disclosure under this provision is to be made by **November 28, 2002** but not before **November 23, 2002**. I have provided the Ministry with a second copy of the audiotape for its files.

2. I uphold the Ministry's decision to deny access to the video portion of the Category 3 videotape record and the parts of the audio portion not covered by Provision 1.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

October 24, 2002 \_\_\_\_\_