

ORDER PO-2238-I

Appeal PA-000370-4

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

The Ministry of the Solicitor General (now the Ministry of Community Safety and Correctional Services) (the Ministry) 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 identified a number of responsive videotapes and photographs, and denied access to all of them. The requester (now the appellant) appealed.

After conducting various inquiries under the *Act*, I issued two interim orders (Interim Order PO-2033-I and Interim Order PO-2056-I), one reconsideration order (Reconsideration Order PO-2063-R) and one final order (Final Order PO-2092-F).

As it turned out, Final Order PO-2092-F did not end the appeal. The Ministry brought an application for judicial review of that order, claiming that I erred in finding that videotaped surveillance records purportedly obtained under Parts VI and XV of the *Criminal Code* of Canada were accessible under the *Act*. However, this application was later abandoned when the Ministry determined that there were no warrants to support the *Criminal Code* arguments. At that point, the Ministry changed its position with the respect to the records under consideration in Final Order PO-2092-F, now claiming that they were exempt under section 21 of the *Act* (invasion of privacy). The Ministry also advised the appellant that more responsive records had been located and that they too qualified for exemption under section 21.

The appellant appealed these two new decisions. She continued to believe that more responsive records should exist, and also complained that certain provisions of Interim Order PO-2033 had still not been complied with.

After conducting another inquiry, I issued Interim Order PO-2221-I. In it, I made findings regarding the application of sections 21 and 23 of the *Act* (the public interest override), ordering most of the records to be disclosed and upholding the Ministry’s decision to deny access to a small portion of one record (see Provisions 1 and 2 of Interim Order PO-2221-I). The Ministry has complied with these order provisions.

Interim Order PO-2221-I also included two provisions dealing with the outstanding search issues. Provision 5 required affidavit evidence on the adequacy of the Ministry’s search for records from OPP Superintendent Susan Dunn, and Provision 6 required corresponding affidavits from various OPP officers with personal knowledge of the various photographic and videotaping activities taking place at Ipperwash during the time period identified in the appellant’s request. These issues remain outstanding and will be addressed in a subsequent order.

Interim Order PO-2221-I also dealt with two other issues, and they are the subject matter of this order:

1. Has the Ministry adequately responded to a number of issues identified during my review of the various videotape records? (Provision 3).
2. Is the Ministry in compliance with Interim Order PO-2033-I? (Provision 4)

DISCUSSION:

Because my findings for the two issues under consideration in this interim order overlap, I have decided to outline the background and the parties' representations for each issue separately first, and then make my findings on both issues together.

HAS THE MINISTRY ADEQUATELY RESPONDED TO THE ISSUES IDENTIFIED DURING MY REVIEW OF THE VARIOUS VIDEOTAPE RECORDS?

Background

After reviewing the various videotape records provided to me in the context of my inquiry leading to Interim Order PO-2221-I, I wrote to the Ministry asking for answers to certain questions, including the following:

On Maintenance Tape 9, there is a section of approximately 20 seconds (18:32:20 to 18:32:40) where the audio portion of the tape is not audible. What is the explanation for this?

The Ministry's initial response to this question was:

This is a technical problem and the OPP are attempting to get the audio enhanced.

In a follow-up letter the Ministry stated:

With respect to [my question] regarding the audibility of a section of the Maintenance Building Video 009, we are enclosing a floppy disk which contains the enhanced version of the portion of the video. The OPP have advised that this is the best quality of the audio that they were able to produce.

I reviewed the "enhanced version" provided by the Ministry, but the 20-second portion was still inaudible.

I gave the Ministry an opportunity to provide a fuller explanation, but received no additional details.

I decided it was necessary for me to view the original videotape records in order to satisfy myself that any outstanding issues regarding these records was not a function of the quality of the copies of these records provided to me by the Ministry. In the context of reviewing the "original" records, I identified a number of additional issues, which are described in Interim Order PO-2221-I.

At this point, I was not satisfied that I had been provided with full access to all of the various responsive records identified by the Ministry. Accordingly, I included Provision 3 in Interim Order PO-2221-I, which reads as follows:

I order the Ministry to provide me with an affidavit sworn by Superintendent Dunn attesting to the following:

- confirming that I have been provided with access to all original Category 2 and Category 4 videotape records
- explaining the following apparent gaps in the audio portion of various videotape records:
 - Maintenance Tape 8 from 13:45:05 to 13:45:33
 - Maintenance Tape 8 from 13:54:06 to 13:54:23
 - Maintenance Tape 9 from 18:08:55 to 18:09:15
 - Maintenance Tape 9 from 18:32:20 to 18:32:40
- explaining why some Maintenance Tapes contain both audio and video footage (Maintenance Tape 9, most of Maintenance Tape 8 and some of Maintenance Tape 10), while others have only video (Maintenance Tapes 1-7 and Gatehouse Tapes 1-6); and further explaining why even when the tapes contain audio, the audio footage is not constant (e.g., there is no audio on Maintenance Tape 8 from the beginning to 12:39:53, and on Maintenance Tape 10 from 2:05:43 to the end).
- explaining why, although the various videotapes were described as original copies, Maintenance Tape 9 begins with footage that is time-coded as 23:03:54 (the start time for Maintenance Tape 10), only to be interrupted and re-started at the correct time of 16:56:43.
- explaining why Maintenance Tape 7 ends with the time-code at 10:38:42 and Maintenance Tape 8 begins with the time-code at 10:46:33, and why footage for the time period 10:38:43 to 10:46:32 is not contained on either of these videotapes.

I received an affidavit from Superintendent Dunn in response to this order provision.

Superintendent Dunn's affidavit

Superintendent Dunn addresses Provision 3 of Interim Order PO-2221-I in paragraphs 10-14 of her affidavit, which read as follows:

10. In Provision 3 of Interim Order PO-2221-I, Assistant Commissioner Tom Mitchinson asks that I confirm that he has been provided with access to all original Category 2 and 4 videotape records. To the best of my knowledge and based upon the information available to me at this time, the Assistant Commissioner has been provided with access to all original Category 2 and 4 videotape records at his request when those records were brought to his office by the O.P.P. on Sunday December 22, 2003.
11. In Provision 3 of Interim Order PO-2221-I, Assistant Commissioner Tom Mitchinson identifies apparent gaps in the audio portion of various videotape records and requires explanations for those gaps. I have made detailed inquiries about the audio gaps and based upon the information provided to me by the officers gathering the information, I am satisfied the gaps are not the result of any editing conducted on the videotapes. Rather, they are caused by the technology of the equipment used to record the audio. This equipment is specially designed to facilitate covert electronic surveillance and a more detailed explanation of how it operates would compromise its current and prospective use.
12. In Provision 3 of Interim Order PO-2221-I, the Assistant Commissioner requests an explanation for why some videotapes contain both video and audio, while others do not. I have made inquiries and I am satisfied that the absence of audio on some videotapes is not the result of editing. The videotaping and audiotaping conducted were controlled separately and the audio was not turned on until later during Maintenance Tape 8, which is the explanation why the beginning of Tape 8 has no audio. In respect to Maintenance Tape 10, there was no one in the Maintenance Shed after 2:05:43 and therefore there was no recorded sound on Tape 10 after that time.
13. In Provision 3 of Interim Order PO-2221-I, the Assistant Commissioner requests an explanation for why the video footage in Maintenance Tape 9 starts, is interrupted, and then starts again at an earlier recorded time. The video log does not offer any explanation for the time codes at the commencement of Tape 9. The Ministry has not had the opportunity within the timeframe of the Order to confirm with an O.P.P. technician what, if any technical explanation could exist but will do so as soon as possible.
14. In Provision 3 of Interim Order PO-2221-I, the Assistant Commissioner requests an explanation for why there is a 7-minute and 51-second gap in the videotaping between the end of Maintenance Tape 7 and the beginning of Maintenance Tape 8. The video log confirms that Tape 7 ended and Tape 8 commenced at the stated times and confirms that there was no videotaping conducted during that 7-minute

and 51-second time period. To the best of my knowledge and based upon the information provided in the video log, the gap in videotaping was not the result of any editing done to this tape.

To date, Superintendent Dunn has provided no additional information regarding the issue referred to in paragraph 13.

The appellant's response

The appellant takes the position that the responses provided by Superintendent Dunn are inadequate. She states:

With respect to paragraph 11, regarding apparent gaps in the audio portion of various videotaped records, [the appellant] submits that it is not sufficient for the Ministry to merely state that the gaps "are caused by the technology of the equipment used to record the audio." Superintendent Dunn should be required to explain what it is about the technology that causes these gaps. Furthermore, although Superintendent Dunn has given evidence that the gaps are not the result of editing, it is not clear whether they are, or could have been, caused by an OPP decision not to record certain aspects of the wiretapped conversations. Accordingly, Superintendent Dunn should be required to provide a full explanation of this matter.

With respect to paragraph 12 of the Affidavit, Superintendent Dunn should explain why the audio recording equipment was not turned on until 12:39:53 of September 7, 1995, and who made the decision to videotape but not audiotape the occupiers prior to that time.

Paragraph 13 of the Affidavit is clearly insufficient, as the Ministry has not even consulted its own technicians to obtain an explanation for the Assistant Commissioner's question. The Ministry's explanation that it has not had time for such consultations "within the timeframe of the Order" is disingenuous. The fact that the copy of Maintenance Tape 9 that the Ministry claims to be raw footage starts with a timecode that could only appear at the end of the original tape was apparent when it was viewed by members of the Stoney Point First Nation community on September 3, 2003, and was noted at that time in the presence of various OPP officers and Ministry counsel.

The appellant goes on to quote from a letter she sent to the Ministry on September 19, 2003 substantiating her position on paragraph 13, and continues:

Accordingly, the Ministry has now had more than four months to obtain an explanation for the timecode discrepancy or to confirm, as is obvious, that the tape is not an original, and to make efforts to find the raw footage of Maintenance Tape 9. This should be remedied immediately.

With respect to paragraph 14 of the Affidavit, merely stating that the videotape has not been edited is insufficient. Superintendent Dunn should explain why no videotaping was conducted during the 7 minute and 51 second time period between Maintenance Tapes 7 and 8, including who decided to stop videotaping during that period.

IS THE MINISTRY IN COMPLIANCE WITH INTERIM ORDER PO-2033-I?

Background

On September 16, 2003, I received an affidavit sworn by Superintendent Dunn outlining the steps taken by the Ministry to comply with Provisions 1 and 2 of Interim Order PO-2033-1. This affidavit was provided to the appellant.

In her appeal documentation, the appellant pointed to a number of perceived deficiencies in the various steps outlined by Superintendent Dunn, and identified reasons for her view that the provisions of Interim Order PO-2033-I have not yet been fully complied with.

In my Notice of Inquiry in the current appeal, I required Superintendent Dunn to swear another affidavit addressing all of the evidence on this issue provided by the appellant in her appeal documentation and in correspondence sent by the appellant to the Ministry between August 25, 2003 and the due date for representations in this inquiry.

Superintendent Dunn's affidavit

I received the requested affidavit from Superintendent Dunn, which I also shared with the appellant. In it she takes the position that the Ministry has fully complied with Interim Order PO-2033-I, with the possible exception of confirming that the Category 2 videotape FOI #6 shown to the appellant was an original record. In that regard Superintendent Dunn states:

In her submissions, at page 44, the Appellant alleges that the Category 2 videotape labelled FOI #6 is not an original videotape because the segments on the tape could not have been recorded in the order that they appear on the tape. To the best of my knowledge, this record is also an original document. However, the Ministry was unable, before the swearing of this affidavit, to make inquiries directly of the officers involved in the making of the videotape. Those specific officers are individuals from whom [the Commissioner's Office] is ordering affidavits and therefore they have not been engaged in this inquiry on the advice of their counsel. Nonetheless, O.P.P.A. [Ontario Provincial Police Association] counsel has been assisting in facilitation communication with the officers and the Ministry will provide a response to this question once information from these officers has been obtained.

The appellant's response

In general, the appellant questions the veracity of Superintendent Dunn's affidavit, since she has no first-hand personal knowledge of many of the statements she attested to and it is not apparent that she consulted with persons having first-hand knowledge necessary to permit her to make the various statements. For example, the appellant appears to accept that issues relating to the so-called "Selected Wescam Shots" videotape (FOI Videotape 5) have been addressed by Superintendent Dunn, but takes the position that "an OPP officer with personal knowledge of this matter should be required to provide this information". The appellant also states:

... to the extent that Superintendent' Dunn's Affidavit was not based on information from those who were personally involved in the OPP operations at Ipperwash ..., all such evidence should now be checked with the appropriate individuals and corrected or supplemented if necessary.

As far as the other records are concerned, the appellant disputes the accuracy of Superintendent Dunn's outline of the various steps taken by the parties in attempting to ensure that original records were provided to the appellant for viewing, but appears to accept that, with one exception, the assurances she sought from the Ministry regarding these records have now been provided.

The one exception is FOI Videotape 6. The appellant submits that further details regarding this record are required, which is apparently acknowledged by Superintendent Dunn in the portion of her affidavit quoted above.

FINDINGS

The evidence provided in Superintendent Dunn's affidavit does not adequately address the various issues raised by me in Provision 3 of Interim Order PO-2221-I.

Although Superintendent Dunn states that, to the best of her knowledge and based upon the information available to her at the time she swore the affidavit, the records provided to me for viewing in late December were original records, her affidavit evidence does not convince me that that was the case. Perhaps the best example is Maintenance Tape 9, which begins with a time-code of 23:03:54, is then interrupted, and reverts to a different earlier time-code of 16:56:43. Is it possible for this to happen on an original videotape? Is it not reasonable to presume that the tape must have been copied and edited? Perhaps there is a satisfactory explanation, but Superintendent Dunn's reference to having reviewed the video log as the basis for concluding that the record is an original is not sufficient evidence to overcome the reasonable presumption that it is not, and no further evidence has been provided. As the appellant points out, and I concur, the Ministry has had more than enough time to obtain any technical explanations but has failed to do so.

As far as compliance with Interim Order PO-2033-I is concerned, because it essentially involves providing the appellant with viewing access to all original videotape records, I must conclude that the affidavit provided pursuant to Provision 4 of Interim Order PO-2221-I is also inadequate.

It is my understanding that the “original” records provided to me for viewing in late December are the same records viewed by the appellant at an earlier date. That being the case, my concerns regarding whether original records have been provided to me would necessarily apply to the appellant as well. To this extent, I am not satisfied that the Ministry has complied with Interim Order PO-2033-I.

As to the various identified audio gaps, while I can accept that the video and audio components of the electronic surveillance technology are controlled separately, the evidence in Superintendent Dunn’s affidavit is not sufficient to explain why the audio track on a tape would be turned off for 20 seconds in the middle of a phone conversation, nor why long sections of various tapes include an audio track even when no occupiers are being videotaped, yet at other times the audio was turned off for that very reason.

At paragraph 11 of her affidavit Superintendent Dunn expresses concern about providing a more detailed explanation of the operation of covert electronic surveillance equipment. I would simply remind the Ministry that any legitimate concern in this respect can be addressed by the application of the confidentiality criteria applied in sharing one party’s representations with another. The parties in this appeal are well aware of this office’s policy for the receipt and sharing of representations as outlined in *Practice Direction 7*.

I have decided that in order to obtain the necessary information to deal with Provisions 3 and 4 of Interim Order PO-2221-I, I will need to summon the appropriate OPP officials, pursuant to section 52(8) of the *Act*, and require them to attend before me and give sworn evidence relating to the various issues that remain outstanding. I will issue my summons for Superintendent Dunn today. Because I do not know the identity of the other OPP officials, I will include a provision in this interim order requiring the Ministry to provide me with the information that I will need to summon them as well.

INTERIM ORDER:

1. I find that the affidavit provided to me pursuant to Provisions 3 and 4 of Interim Order PO-2221-I is inadequate.
2. I order the Ministry to provide me with the following information by **February 12, 2004**:
 - the names and contact information for all OPP officers, employees and/or former officers/employees who created each videotape record identified to date by the Ministry as responsive to the appellant’s request, together with specific details as to which officer/employee created which record;
 - the names and contact information for all OPP officers, employees and/or former officers/employees who have been responsible for storage and handling of each videotape record from the date of its creation to the date of this order, including specific details as to which officer/employee stored and/or handled which record and when;

- the names and contact information for all OPP officers, employees and/or former officers/employees who have copied and/or used any videotape record from the date of its creation to the date of this order, including specific details as to which officer/employee used/copied which record, when, and for what purpose;
- the names and contact information for all OPP officers, employees and/or former officers/employees who have technical knowledge regarding the operation of all video and audio equipment used to create, store, handle, copy and/or use the videotape records at issue in this appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

February 5, 2004 _____