Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3261

Appeal PA09-96

Archives of Ontario

October 2, 2013

Summary: The appellant made a request to the Archives for records relating to the Six Nations of Grand River. Archives withheld a number of the responsive records in full and in part, citing a number of exemptions. Following mediation and the inquiry process, the exemptions remaining at issue consist of the discretionary exemption at section 19 (solicitor-client privilege) and the mandatory exemption at section 21(1) (personal privacy). Archives also withheld two records in full on the basis that they were excluded from the *Act* under section 65(1)(a). The appellant also raised the issue of the application of the public interest override in section 23. This order upholds Archives decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definitions of "institution", "personal information"), 10(2), 19, 21(1), 21(2)(f), 21(2)(i), 21(3)(h), 65(1)(a).

Orders and Investigation Reports Considered: MO-2324.

OVERVIEW:

[1] The Archives of Ontario (the Archives) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to 41 files containing records maintained by Archives related to the Six Nations of Grand River (Six Nations Band). The appellant identified both the file number and box number in which the files

containing the responsive records are held. Shortly after submitting the request, the appellant expanded the scope of the request to include 5 additional files.

[2] Archives located the responsive records and issued a decision letter with an accompanying index of records advising that it was granting partial access to them, as follows:

- Access to the records in 19 files was granted in full;
- Access to the records in 2 files was denied in full pursuant to the exemptions at sections 15 (relations with other governments) and 19 (solicitor-client privilege);
- Access to 628 pages of records denied in full pursuant to the exemptions at sections 12 (cabinet records), 13 (advice or recommendation), 14 (law enforcement), 15, 18 (economic and other interests), 19 and 21(1) (personal privacy);
- Access to 41 pages of records denied in part pursuant to the exemption in section 21(1).

[3] In its decision, Archives stated that one of the identified boxes which the appellant identified as containing some of the requested files was empty. Archives also stated that another one of the identified boxes containing some of the requested files, as well as one of the requested files in a different box could not be located. It advised that it would continue to search for the missing box and file and advise the appellant accordingly.

[4] During mediation, Archives issued a revised decision and advised that it had located the missing file, as well as a number of additional files that had been inadvertently omitted. It disclosed all but one of the newly located files to the appellant, denying access to one of them pursuant to sections 13, 15 and 19 of the *Act*. Archives also identified two records that it had withheld in error and disclosed them to the appellant. However, it did not locate the missing files from the empty box.

[5] Also during mediation, the appellant confirmed that she only wished to appeal Archives' exemption claims and she is not interested in pursuing access to personal email addresses, phone numbers or addresses. Accordingly, records in which only this type of information was severed have been removed from the scope of the appeal.

[6] During the inquiry into this appeal, the adjudicator assigned sought and received representations from Archives and the appellant. Also during the inquiry, the following occurred:

- Archives agreed to release 53 pages of records that were previously withheld in full or in part and 8 pages of record that were previously withheld in full.

- The adjudicator removed the application of the exemptions at sections 12, 13 and 14 from the scope of the appeal.[1]

- Archives raised the issue of the application of the exclusion in section 65(1) of the *Act* to two records.

- Archives withdrew its claim of section 15 and released 100 pages of records that were previously withheld in full.[2]

- Archives withdrew its claim of section 18 and released 162 pages of records that were previously withheld in full.[3]

[7] Thus, at the end of the inquiry process only the following remained within the scope of the appeal: the exemptions at sections 19 and 21(1), the exclusion of two records under section 65(1)(a) and the possible application of section 23 of the *Act*.

[8] In this order, I uphold Archives' decision.

RECORDS:

[9] The records at issue are set out in an index, which is in the appendix to this order. I have used the revised index provided by Archives with its reply representations, and not included the records disclosed to the appellant when Archives decided to withdraw its claim under section 18.

ISSUES:

A. Does section 65(1)(a) apply to exclude some of the records at issue from the scope of the *Act*?

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[1] The adjudicator determined that Archives no longer intended to rely on these exemptions as Archives did not address the application of these discretionary exemptions in its representations. Archives did not dispute this fact during the inquiry.
[2] Archives revised decision dated July 19, 2012.
[3] Archives revised decision dated April 30, 2012.

B. Does the discretionary exemption at section 19 apply to the records?

C. Did Archives properly exercise its discretion in applying section 19?

D. Do the records contain "personal information" within the meaning of section 2(1), and if so, to whom does it relate?

E. Does the mandatory exemption in section 21(1) apply to records?

F. Does the public interest override in section 23 apply to the records withheld under section 21(1)?

DISCUSSION:

A. Does section 65(1)(a) apply to exclude some of the records at issue from the scope of the *Act*?

[10] Archives submits that two records contained in File 1 are excluded from the scope of the *Act* by virtue of the application of section 65(1)(a) which states:

> This Act does not apply to records placed in the archives of an educational institution or the Archives of Ontario by or on behalf of a person or organization other than,
>
> (a) an institution as defined in this Act or in the *Municipal Freedom of Information and Protection of Privacy Act*.

[11] Archives submits that two records in File 1 are excluded because they were placed in Archives by the Ipperwash Inquiry, which is not an institution under the provincial or municipal *Acts*.

[12] Archives did not claim the exclusion with its initial decision and instead raised the issue of the *Act's* application during the inquiry. The appellant submits that I should not allow Archives to claim the exclusion and moreover, she would suffer prejudice should I allow Archives to do so. The appellant states:

> As several Orders have noted, the value of information requested frequently declines with age. Had the Archives notified the appellant earlier that it was denying access to pages 12 - 16 of File 1 based on section 65(1), the appellant could have begun the process of seeking this information directly from the Government of Ontario through a new freedom of information request. Instead, the Archives led the appellant to believe, for 2.5 years, that the denial of access to this information was based solely on section 13. The appellant believed that this exemption

> claim would eventually be dropped, and she would thus obtain access to this information upon the conclusion of this appeal.

[13] The appellant further submits that the late-raising of the exclusion has compromised the integrity of the appeals process and may have been done so in bad faith.

[14] Before I consider whether the exclusion in section 65(1)(a) applies I will address the appellant's submission that Archives should not be allowed to claim it. This office has a long line of orders considering whether institutions can claim discretionary exemptions after the deadline date set out in the IPC's *Code of Procedure*. In those cases, the adjudicator will consider the prejudice to be suffered by the requester as well as the effect of allowing the discretionary exemption claim on the integrity of the appeals process. In the present case, the application of the exclusion involves a different consideration. Simply put, I must consider the application of an exclusion under the *Act* in circumstances where it may apply. Archives submitted that I apply the approach taken by Adjudicator Colin Bhattacharjee in Order MO-2324 where he stated:

> The application of section 52(3) is a jurisdictional issue. If section 52(3) applies to a specific record and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's jurisdiction. Consequently, I have a duty to consider the possible application of any of the three exclusionary provisions in section 52(3), even if they are raised late or not even raised by an institution at all.

[15] Adjudicator Bhattacharjee also considered whether the integrity of the appeals process would be affected by considering the exclusion. He found that as the institution had raised the exclusion during mediation, the appellant in that case had adequate opportunity to make representations on its application.

[16] I agree with Adjudicator Bhattacharjee's approach and apply it here. In the present appeal, Archives did not raise the exclusion until during the inquiry. However, during the inquiry the appellant was provided the opportunity to argue against both the raising of the exclusion and its application and has done so in her representations. As stated above, as the application of the exclusion goes to my jurisdiction to consider the records under the *Act*, and as the appellant has had an opportunity to argue against the exclusion, I will now consider whether the exclusion applies.

[17] Archives submits that section 65(1)(a) applies to a confidential report and an email chain which are included in the records found in File 1. Both of these records were placed with Archives by the Ipperwash Inquiry which is not an institution under

the *Act*, the municipal *Act* or a health custodian under the *Personal Health Information Protection Act*. Archives states:

> The Ipperwash Inquiry was established on November 12, 2003 under the *Public Inquiries Act*. Its mandate was to inquire and repot on events surrounding the death of Dudley George, who was shot in 1995 during a protest by First Nation representatives at Ipperwash Provincial Park and later died. Under the *Archives and Recordkeeping Act*, the records of Commissions of Inquiry are transferred to the Archives of Ontario after the Commission has concluded. The Commissioner will, on conclusion of an Inquiry, typically order the transfer of records to the Archives with provisions as to which of the records may be accessed by the public, and which are to be sealed. Notably, Commissions of Inquiry are constituted independent of the government, and are not part of any ministry or agency of the government. The Ipperwash Inquiry was not scheduled as an institution subject to the *Act* in Ontario Regulation 460.

[18] The appellant submits that the Ipperwash Inquiry, as a Commission of Inquiry, was part of the Government of Ontario and meets the intended meaning of an institution under section 65(1) of the *Act*. The appellant submits that the Ipperwash Inquiry is an institution under the *Act* or should be considered part of an institution for the following reasons:

- The commission is established by the Lieutenant Governor and appoints persons as commissioners and assigns roles and responsibilities to the commissioners[4].

- The Attorney General of Ontario maintains responsibility for the public inquiry or designates a minister who is responsible.

- Though the Commission has some freedom in their activities under section 7 of the *Public Inquiries Act*, the Commission must primarily work towards the fulfillment of its duties, as laid out by the Lieutenant Governor.

- Regardless of whatever limited independence and freedoms a Commission may have in regard to fulfilling its duties, the Crown remains liable for "acts or omissions of a minister of the Crown, a public servant, a commission, a commissioner, a person acting on behalf of or under the direction of a commission[5].

[4] *Public Inquiries Act*, S.O. 2009, c. 33, Sched. 6, ss. 2 - 3
[5] *Ibid*, section 23(2)

- The Crown continues to maintain a number of responsibilities, in consultation with the commissioners under section 25 of the *Public Inquiries Act*; and the Lieutenant Governor in Council "may continue to make regulations considered necessary and advisable" for a Commission "carrying out the intent and purpose of [the Act]."

- Ipperwash Inquiry was always part of the Government of Ontario, under the Ministry of the Attorney General's office, and thus meets the definition of an institution under the intended meaning of the *Act*.

- Ipperwash Inquiry no longer exists and thus the records are now records of the Ministry of the Attorney General which is an institution under the *Act*.

[19] The appellant also argues that the records are not privileged in any way under the *Public Inquiries Act* and by withholding the record Archives is violating the purpose of the *Act*.

[20] Archives responded to the appellant's submission that the Ipperwash Inquiry is effectively an institution under the control of the Ministry of the Attorney General. Archives argues that Ipperwash Inquiry is independent of government and states:

- The Ipperwash Commission of Inquiry was established by Order-in-Council 1662/2003 effective November 12, 2003. The records at issue (File 1) were provided directly to [Archives] by the Ipperwash Commission of Inquiry. Given the sensitivity of the records, the Commissioner placed a restriction on public access/disclosure of the records for a period of 20 years (i.e. until 2027).

- Commissions of Inquiry are independent of Ministries in order to be free from the personal, political, partisan or organization influences that accompany public controversies.[6] Accordingly the Ipperwash Commission of Inquiry cannot be considered a part of the Ministry of the Attorney General.

- The Ipperwash Inquiry was commenced under the previous *Public Inquiries Act*, R.S.O. 1990, c. P.41 and not the one referred to by the appellant.

[6] Quoted by Archives in its representations.
http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/li/pdf/CommissionerOpeningRemarks.pdf

- However, nothing in the Order-in-Council (OIC) appointment nor the *Public Inquiries Act*, R.S.O. 1990, c. P.41 that would suggest that the Ipperwash Inquiry is not independent of the Ministry of the Attorney General. While the Commission reported its findings, conclusions and recommendations to the Attorney General, these facts cannot make it "part of the government of Ontario under the Ministry of the Attorney General's Office" as suggested by the appellant.

[21] Archives also lists the following factors in support of establishing the independence of the Ipperwash Inquiry:

- Section 3 of the *Public Inquiries Act*, R.S.O. 1990, c. P.41, provides that the conduct and procedure to be followed on an inquiry is under the control and direction of the commission conducting the inquiry.

- The Commission hired its own staff, counsel and advisers;

- The OIC required all government Ministries, Cabinet Office, Premier's Office, and all government agencies, board and commissions to cooperate with the Commission;

- The Ministry had no statutory right or other right to dictate to the Commission what records the Commission should create, use or maintain or what use to make of the records they possess;

- The Ministry had no statutory or other right to assert a right to possess or dispose of the records of the Commission;

- Commissions of Public Inquiry are separate public bodies under the *Archives and Recordkeeping Act*.

[22] Lastly, Archives emphasizes that the Ipperwash Inquiry Commission was not a scheduled institution subject to the *Act* in Ontario Regulation 460.

[23] Based on the parties' representations and the definition of "institution" in section 2(1) of the *Act*, I find that the Ipperwash Inquiry Commission is not an "institution" under the *Act*. The Ipperwash Inquiry is not designated as an institution in Regulation 460 and furthermore, I find that the appellant has not established that it was part of the Ministry of the Attorney General. I find that the Ipperwash Inquiry was established to be separate and independent of the government and its ministries and as such, cannot be characterized as being part of an institution that is covered under the *Act*.

[24] As I have found that the Ipperwash Inquiry is not an institution and Archives has established that the records at issue in File 1 were placed in Archives by the Ipperwash Inquiry, then I find that section 65(1)(a) applies. I find that the *Act* does not apply to the confidential report and the email chain which are found in File 1. I uphold Archives' decision with respect to these records.

B. Does the discretionary exemption at section 19 apply to the records?

[25] Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
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> (a) that is subject to solicitor-client privilege;
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> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
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> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[26] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution or hospital, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[27] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[7]

Solicitor-client communication privilege

[28] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[8]

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[7] Order PO-2538-R; *Blank* v. *Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[8] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[29] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[9]

[30] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[10]

[31] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[11]

[32] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[12]

Waiver

[33] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[34] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege[13]

[35] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14]

[36] Archives submits that 19(a) and (b) apply. With respect to section 19(a), Archives submits that each of the records are subject to solicitor-client privilege at common law because they directly relate to the seeking and giving of legal advice on land claims issues. Archives states:

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[9] Orders PO-2441, MO-2166 and MO-1925.
[10] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[11] *Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[12] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[13] *S. & K. Processors Ltd.* v. *Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[14] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman* v. *General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R.* v. *Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

> For example, the record contained in File 20, page numbers 10 – 44 is instructive. This record is a 35 page memorandum prepared by legal counsel, outlining the question posed to counsel, and counsel's advice. The opinion interprets facts and uses established legal principles to assess the question and provide legal advice to the government of Ontario. This is a clear example of solicitor-client communication.
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> There are also several records (File 20, pages 6 – 9, 45 – 46, 54 – 60, 61 – 65, 103 – 104, 105 – 106, 107 – 108) in which the various provincial program areas responsible for dealing with the Six Nations land claims are writing to government solicitors, posing distinct questions and requesting legal advice. Again, these records are direct communications between solicitors and their clients as contemplated and captured by the first head of the privilege under branch 1.

[37] Archives also identifies File 20, pages 114 – 122 and File 21, pages 1- 9 as memoranda that were prepared by a law student for the Ministry of Natural Resources under the supervision of counsel. Archives states:

> The individual worked at the Ministry of Natural Resources in the Office of Indian Resource Policy. This particular record was prepared as a legal analysis of the common law and statutory law in an effort to assist the development of the government's position. The paper was provided to senior counsel in the Ministry and laid the groundwork for the legal advice subsequently given. Accordingly, the record qualifies for exemption under branch 1, because it is directly related to the giving and seeking of legal advice. In this regard, the work of articling students, or students-at-law, is also subject to privilege when the work is prepared for supervising counsel in furtherance of the provision of legal advice to a client.[15]

[38] In support of its section 19(b) claim, Archives submits that the records for which this section has been claimed also qualify for exemption because they were created by or for Crown counsel for use in giving legal advice.

[39] The appellant submits that Archives has not established the direct communication link between solicitor and client or Crown counsel and client. Further, the appellant argues that even if privilege did exist, the government has waived the privilege by providing the legal advice or opinion to outside parties, thus negating the confidentiality of the advice given.

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[15] Archives cited, *Descoteaux* v. *Mierzwinksi* (1982), 141 D.L.R. (3d) 590 S.C.C. and Order PO-2704 where documents transferred to legal counsel from staff relating to the issues for which advice has been sought were found to be subject to solicitor-client privilege.

[40] In response to the appellant's argument about whether the government has waived its privilege in the records, Archives states:

> The appellant has speculated that privilege may have been waived however, the Appellant has not provided any evidence to support her theory that privilege "could have" been waived. The IPC has stated that initially, the party that asserts waiver has the burden of proving the elements of waiver [Order MO-1923-R]. The Archives submits that no prima facie case of waiver has been established by the appellant.
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> For waiver to be established it has to be shown that the holder of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive the privilege [Order PO-2441]. It is the Archives position that it has not waived any privilege with respect to the documents subject to the section 19 exemption. There is nothing on the face of the records, or the context in which they have maintained by the Archives of Ontario to suggest that there has been a waiver of privilege. The records reflect the seeking and giving of legal advice by and for government of Ontario officials and not external parties. In this regard, the Archives submits that the records have been maintained in confidence consistent with the general treatment of solicitor-client privileged records by the Government of Ontario.

[41] Based on the material before me and the parties' submissions, I find that both Branch 1 and Branch 2 of section 19 apply to the records at issue. It is clear that the withheld records constitute direct confidential communications between the solicitor (outside counsel or government counsel) and the client (government departments or officials). While the appellant questioned Archives' evidence of the direct communication link, it is evident from my review, based on written notes on the record, or references on the "to" and "from" lines in the memoranda that the records in question were being exchanged between legal counsel and a client.

[42] I further find that the appellant has not established that the government client represented in these records has waived their right to the privilege; nor do I find evidence that Archives has otherwise waived the privilege to these records.

[43] Accordingly, I find that section 19 applies to exempt these records, subject to my review of Archives' exercise of discretion below.

C. Did Archives properly exercise its discretion in applying section 19?

[44] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its

discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[45] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[16] This office may not, however, substitute its own discretion for that of the institution.[17]

[47] Archives submitted that it considered the following factors in deciding to not disclose the records withheld under section 19:

- The purposes of the *Act*: Archives submits that it provided the appellant with a substantial number of records and, in addition, has reviewed its original access decision a number of times and released further records. Archives has made sure that the exemptions claimed for records have been limited and specific subject to the appellant's right of access.
- The nature of the information and the extent to which it is significant and/or sensitive to the institution: Archives submits that it consulted with the Ministry of Aboriginal Affairs as part of its original assessment of the records and again when it reassessed its access decision. During these discussions, Archives confirmed that the records and information withheld by Archives was both significant and sensitive to that Ministry, and by extension, to the government of Ontario.
- Age of the information: Archives considered the age of the records when it reassessed its access decision and disclosed additional records. In this way, Archives attempted to provide as much information to the appellant while protecting only sensitive information.

[16] Order MO-1573.
[17] Section 54(2).

- Whether the requester has sympathetic or compelling reasons for the records: Archives notes that while the appellant has not articulated a sympathetic or compelling reason for the records, it understands that the appellant is seeking the information for research purposes. This fact was given significant weight when Archives made its original access decision and when it reassessed this decision. Archives also consulted with the Ministry of Aboriginal Affairs to provide additional detailed historical context in its representations which would be relevant to the appellant's research.

[48] The appellant suggests that Archives acting in bad faith in not properly assessing the application of exemptions and disclosure of records at the initial request stage or at an earlier point in time. The appellant also submits that Archives, in conjunction with the Minister of Aboriginal Affairs and the Canadian Government, has misrepresented several historical facts in its representations. The appellant submits that Archives should have considered the following factors in its exercise of discretion:

- Age of the records: Several of the records are more than 30 years old and it is not possible that disclosure of these records could result in harm to the government.

- Extent to which the information in the records has already been widely disseminated over the past few decades. Accordingly, the appellant suggests that most likely there would be very little new information contained in the records at issue.

- Public confidence: Disclosure of the information would inspire public confidence in the access to information process and public confidence in the Archives of Ontario. By denying access to old records, Archives is denying the ability to hold their government accountable and hampering the ability of Six Nations to a fair and just settlement negotiation.

- Sympathetic or compelling need: The appellant suggests that Archives could have considered the sympathetic and compelling need of the Six Nations community.

[49] In reply, Archives submits that while the appellant has taken issue with its description of the Six Nation's claims and the historical facts outlined in its submissions, this is purely a different interpretation of the facts, historical record and applicable law surrounding the Six Nation's claims. Archives submits that a disagreement about these matters does not demonstrate bad faith on the part of the province or itself.

[50] As stated above, this office cannot substitute its exercise of discretion for that of the institution. I have reviewed the parties' submissions on Archives' exercise of discretion to withhold information under section 19 of the *Act*. Based on this material, I find that Archives properly exercised its discretion to withhold the information in the records under section 19. I find that Archives considered relevant factors and did not consider irrelevant factors. Moreover, the appellant has not established that Archives acted in bad faith by withholding records which I have found to be properly exempt under section 19. I find that Archives has considered the age of the records, the purposes of the *Act*, the sensitivity and importance of the records being withheld and the appellant's interest in the records. These are all proper considerations and I uphold Archives' exercise of discretion.

D. Do the records contain "personal information" within the meaning of section 2(1) of the *Act*, and if so, to whom does it relate?

[51] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[52] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[18]

[18] Order 11.

[53] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
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> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[54] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[19]

[55] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[20]

[56] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[21]

[57] Archives submits that three records for which section 21(1) was claimed contain the personal information of identifiable individuals who are named in the records. It states:

> The three records relate to policing on the Six Nations Reserve. The first of these records is a note written by a Superintendent of Police assessing which officers should be involved in policing the Reserve with a view to facilitating better communications between the police, Council members and residents of the Reserve (File 2, page 1). In this context, the names of several police officers appear whose suitability for policing the Reserve is then commented on by the Superintendent. In the context of making assessments as to suitability, the race of one of the individuals is noted.

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[19] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[20] Orders P-1409, R-980015, PO-2225 and MO-2344.
[21] Order PO-1880, upheld on judicial review in *Ontario (Attorney General)* v. *Pascoe*, [2002] O.J. No. 4300 (C.A.).

> The second record is a memorandum written to the Deputy Solicitor General about O.P.P. operations on the Six Nations Reserve (File 2, page 2). This record contains the names of individuals who came forward and reported issues and concerns with policing on the Reserve. It also contains the names of officers about whom complaints had been received.
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> …
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> The third record is a letter sent from the Superintendent of Police outlining some issues with policing on the Six Nations Reserve (File 2, pages 3 – 8). Similar to the other records, it reveals the names of officers about whom complaints had been made, and the names of complainants. As has already been noted and addressed above, the Archives takes the position that the information contained within this record is personal information consistent with the definitions in [paragraphs (a) and (h) of the definition of that term in the *Act*].

[58] Archives submits that all of the information is the personal and not professional information of the officers as their names appear in the context of allegations of wrongdoing. Archives cites Order PO-2778 where this office held that information about an employee, where it relates to allegations of wrongdoing should be considered the personal information of that individual.

[59] The appellant submits that she is unable to make representations on whether the information withheld under section 21(1) is personal information. She also confirms that she clarified during mediation that she was not interested in personal information. Instead the appellant questions whether the records could be severed to disclose the information which is not personal.

[60] Based on my review of the records, I find that the information contained in these records is recorded information about identifiable individuals, namely the identified police officers and complainants. I also accept Archives' submission that disclosure of the information, although relating to the officer's official capacity, would disclose something of a personal nature about the officers. Specifically, disclosure would reveal the race, employment history and information relating to complaints and wrongdoing. I find that this is the officer's personal information within the meaning of paragraphs (a), (b) and (h) of the definitions of that term in section 2(1) of the *Act*.

[61] I also wish to address the appellant's question as to whether the record could be severed to remove the personal information. Under section 10(2) of the *Act*, the head is obliged to disclose as much information as can reasonably be severed from the responsive record without disclosing information that is protected by the exemption. This office has found that it is not reasonable to sever a record if doing so would result

in the disclosure of only disconnected snippets of information or worthless, meaningless or misleading information.[22]

[62] I note that two of the records where section 21(1) was claimed have already been severed to disclose the remaining information not subject to the exemption. I find Archives' severing of these records to be reasonable. The only record fully withheld relates solely to an incident where two individuals complained about an officer. I find that the removal of "personal information" from this particular record would only leave disconnected snippets which would be meaningless to the appellant. As such, I find that it would not be reasonable for Archives to sever this record to disclose the non-personal information to the appellant.

E. Does the mandatory exemption in section 21(1) apply to the records?

[63] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[64] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In this appeal, it appears that only 21(1)(f) is relevant. This section states:

> 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.

[65] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). If any of the paragraphs in subsection 21(3) apply, disclosure is presumed to be an unjustified invasion of personal privacy under section 21(1). Only subsection 21(4) or the "public interest override" in section 23 can overturn a presumed unjustified invasion of privacy under section 21(3).[23] If sections 21(3) and 21(4) do not address the records, the criteria in section 21(2) are considered and weighed to determine whether disclosure would be an unjustified invasion of privacy.

[66] In the present appeal, section 21(4) is not relevant. The appellant submits that public interest override should apply and I will consider that below.

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[22] Orders PO-2033-I, PO-1663 and PO-1735 and *Ontario (Minister of Finance)* v. *Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).
[23] *John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

[67] Archives submits that the presumption in section 21(3)(h) and the factors in sections 21(2)(f) and 21(2)(i) are relevant. These sections state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[68] Archives submits that the presumption section 21(3)(h) is relevant as the information in the record that was withheld contains information that would disclose the individual's racial origin. I accept that disclosure of this personal information is presumed to be an unjustified invasion of the individual's personal privacy such that section 21(1) would apply to exempt this information.

[69] For the rest of the information withheld in the records, Archives submits that I should consider the factors favouring privacy protection. Regarding the factor in favour of privacy protection in section 21(2)(f), Archives submits that in Order P-1618, personal information of complainants, witnesses or suspects in their contacts with the police has been found to constitute highly sensitive information. Archives submits that similar types of information are withheld in the records at issue with respect to persons who brought complaints forward about policing on the Six Nations Reserve. Archives argues that this factor should be given significant weight as the information contained in the records is the type of information that would normally be considered highly sensitive by the IPC.

[70] For the factor in section 21(2)(i), Archives cites Orders P-1245 and PO-2657 in support of their position that disclosure of personal information contained within investigations can cause unfair reputational harm. Archives states:

> The records in the current appeal do not rise to the level of formal investigations but because they arise in the context of complaints, disclosure of the contents could result in reputational harm. The records implicate the officers in allegations of wrongdoing and question the

> appropriateness of their continued work in the Six Nations Reserve. Unlike a formal conviction, there is no conclusion to the complaints which makes reputational harm more likely if the records were disclosed.

[71] I accept Archives' submission that disclosure of some of the information could reasonably be expected to cause significant personal distress if the information is disclosed and should be considered highly sensitive. I further accept that due to the nature of the allegations set out in the records, disclosure of these untested allegations may result in unfair damage to the reputation of the officer. The appellant did not advance the application of any factors favouring disclosure and I am unable to independently find any factors that are relevant. As stated above, in order for me to find that section 21(1)(f) does not apply, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[24] Accordingly, I find that section 21(1) applies to exempt the personal information in the records from disclosure.

F. Does the "public interest override" in section 23 apply to the information withheld under section 21(1)?

[72] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[73] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[74] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[25]

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[24] Orders PO-2267 and PO-2733.
[25] Order P-244.

Compelling public interest

[75] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[26] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[27]

[76] A public interest does not exist where the interests being advanced are essentially private in nature.[28] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[29]

[77] The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

[78] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[30]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[31]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[32]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[33]
- the records do not respond to the applicable public interest raised by appellant.[34]

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[26] Orders P-984, PO-2607.
[27] Orders P-984 and PO-2556.
[28] Orders P-12, P-347 and P-1439.
[29] Order MO-1564.
[30] Orders P-123/124, P-391 and M-539.
[31] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[32] Orders M-249, M-317.
[33] Order P-613.
[34] Orders MO-1994 and PO-2607.

[79] The appellant submits that her interest is not merely a private research interest and does not represent only a historical curiosity. Further, she submits that she has been in contact with numerous people including members of both Six Nations governments, the Six Nations community at large, non-Native Canadians working to counteract anti-Native racism, and from Ontario public interest lawyers and national reporters who focus on First Nations issues, including those who covered the Ipperwash Inquiry. The appellant states that the reporters have expressed an interest in writing about the outcome of the appeal. The appellant submits that there is a great deal of existing public interest around the records and a great deal more of potential public interest, not just from First Nations groups.

[80] The appellant submits that the public interest is compelling and states:

> …First Nations peoples throughout Canada have been protesting *en masse* since early December. They have been joined by perhaps tens of thousands of non-Native allies – from union members, to environmentalists, to students, to individuals who want to see justice for First Nations in Canada. These protests, which have spread to the United States and Australia, have gained widespread support from around the world. It is difficult to imagine very many things that would be considered a more compelling public interest at this point in time than the compelling public interest for justice for indigenous people in Canada.
>
> …
>
> The records in this appeal tell an important portion of this story for those people living in and around the largest First Nations reserve in Canada.
>
> …
>
> With a commitment to transparency, and without a willingness to reveal the long-hidden history of Native-Canadian relations – including the complexities of treat agreements, land claims and First Nations legal rights – the federal and/or provincial governments in Canada are creating the conditions for escalating, radicalized conflicts that greatly erode – if not destroy outright – the tolerant fabric of Canadian society.

[81] The appellant also submits that there is a public interest in democracy in Canada and the freedom of information process. The appellant states:

> Thus, it is not just the Six Nations and their local non-Native allies who have an interest in justice for the Six Nations. All Canadians who understand that their fate is intricately tied to the fate of Canada's first Nations also have a compelling public interest in a return to democracy

> and government transparency, and in seeing that justice is done and reconciliation is achieved with these First Nations.

[82] Archives acknowledges that there is a public interest in the subject matter of the appellant's research, but submits that it is not a "compelling" one. Archives states:

> The Archives has given careful consideration to the appellant's request, and has made a decision to release a significant amount of information in the records given their connection with the appellant's research. Indeed, disclosure of the information by the Archives in these circumstances is consistent with the very purpose in which Archives maintains records of archival value.
>
> However, the Archives, as an institution subject to the [*Act*], must nevertheless apply the exemptions and principles of the *Act* when making decisions to release archival records. In the present case, the Archives is of the view that the historical interest in the records, while not insignificant, does not approach the threshold of "compelling public interest" described in the *Act* and interpreted by the IPC in previous Orders. In this regard, the Archives respectfully submits that disclosure of the records is not required to provide information to allow the public to express opinion on an issue of current and significant importance. Further disclosure of the information contained in the records will not assist the public in making political choices.

[83] Having reviewed the parties' submissions, I find that the appellant has established that there is a public interest in the records relating to the Six Nations peoples. Moreover, I find that this public interest is current. I further find that the appellant's interest extends beyond just research or historical purposes, and that she would have little trouble disseminating the information. Unfortunately I am unable to find that there is a compelling public interest in the records that I have found exempt under section 21(1) of the *Act*. As stated above, the information that has been withheld under section 21(1) of the *Act* relates only to policing on the Six Nations Reserve. Specifically, the records contain complaints made by individuals about a specific officer and the race of another officer. I find that these are essentially private matters which predominantly relate to the individuals involved. While it could be argued that these records speak to the larger issue of policing on the reserve, I find that there is not a compelling public interest in the personal information within these particular records.

[84] Accordingly, I find that section 23 does not apply.

ORDER:

I uphold Archives' decision and dismiss the appeal.

October 2, 2013

Stephanie Haly
Adjudicator

APPENDIX

Folder	File Title	Date and Description	Page numbers withheld	Exemption claimed	Finding
1	RG 18-214 Records of the Ipperwash Inquiry: Current Conflict Caledonia	No Date Confidential Report	25	Withheld in full, section 65(1)	Uphold
	No title	July 26, 2006 and July 24, 2006	12 – 16 (5 pages)	Withheld in full, section 65(1)	Uphold
2	RG 33-4 Deputy Solicitor General Subject Files: Six Nations Indian Reserve #59.16	No Date Correspondence	1	Withheld in part, section 21(1)	Uphold
	No title	February 1, 1973 Memorandum	2 (1 page)	Withheld in full, section 21(1)	Uphold
	No title	January 25, 1973 Correspondence	3 – 8 (6 pages)	Withheld in part, section 21(1)	Uphold
3	RG 1-568 Native Bands, Reserves and Land Claims Files: Six Nations Indian Band – General May 19, 1976	March 28, 1983 Correspondence	1	Withheld in full, section 21(1)	Uphold
4	RG 29-59 Correspondence of the Minister of Community and Social Services: Six Nations Reserve – Indian Affairs	July 30, 1973 Memorandum	1	Withheld in full, section 19	Uphold
7	No title	October 30, 1981	8 – 9 (2	Withheld in	Uphold

		Correspondence	pages)	part, section 19	
8	RG 1- 568 Native Bands, Reserves and Land Claims Files: Six Nation Band – Claim re: Tow Paths September 16, 1976 – December 19, 1980	November 22, 1976 Correspondence	1	Withheld in full, section 19	Uphold
10	RG 1- 568 Native Bands, Reserves and Land Claims Files: Six Nation Band – General Surrender of 1841 April 9, 1986 – August 27, 1986	July 28, 1977 Memorandum	26 (1 page)	Withheld in full, section 19	Uphold
11	RG 1-568 Native Bands, Reserves and Land Claims Files: Six Nation Band – Tow Paths April 30, 1985	September 6, 1985 Memorandum	7 – 8 (2 pages)	Withheld in full, section 19	Uphold
12	RG 1-568 Native Bands, Reserves and Land Claims Files: Six Nations Band – Unsold Surrendered Indian reserve Lands April 10, 1989	March 18, 1991 Memorandum	8 – 10 (3 pages)	Withheld in full, section 19	Uphold
14	RG 1-568 Native Bands,	October 30, 1981 Correspondence	24 – 25 (2 pages)	Withheld in part, section	Uphold

	Reserves and Land Claims Files: Six Nation Band – Claim re: Bed of Grand River February 6, 1981 – December 14, 1982			19	
		October 21, 1981, September 10, 1981, October 13, 1981, October 20, 1981	26 – 35 (10 pages)	Withheld in part, section 19	Uphold
15	RG 1 – 568 Native Bands, Reserves and Land Claims Files: Six Nation Band – Claim re: Bed of Grand River January 6, 1983	May 13, 1991 April 15, 1991 Correspondence	4 – 7 (4 pages)	Withheld in part, section 19	Uphold
20	RG 1- 568 Native Bands, Reserves and Land Claims Files: Six Nation Band – Legal Opinion September 16, 1976 – December 22, 1983	No date Correspondence	1 – 9 (9 pages)	Withheld in full, section 19	Uphold
	No title	December 16, 1983 Memorandum	10 – 44 (35 pages)	Withheld in full, section 19	Uphold
	No title	October 17, 1983 Memorandum	45 – 46 (2 pages)	Withheld in full, section 19	Uphold
	No title	January 12,1983 Memorandum	51 – 52 (2 pages)	Withheld in full, section 19	Uphold
	No title	January 12, 1983	53 – 60	Withheld in	Uphold

		December 14, 1982 Memorandum with cover page	(8 pages)	full, section 19	
	No title	December 13, 1982 Memorandum	61 – 64 (4 pages)	Withheld in full, section 19	Uphold
	No title	August 12, 1982 Memorandum	65 – 91 (28 pages)	Withheld in full, section 19	Uphold
	No title	December 14, 1981 Memorandum	92 – 102 (11 pages)	Withheld in full, section 19	Uphold
	No title	June 3, 1982 Memorandum	103 – 104 (2 pages)	Withheld in full, section 19	Uphold
	No title	June 2, 1982 Memorandum	105 – 106 (2 pages)	Withheld in full, section 19	Uphold
	No title	March 11, 1982 Memorandum	107 – 108 (2 pages)	Withheld in full, section 19	Uphold
	No title	October 22, 1981 September 10, 1981 Memorandum	109 – 124 (16 pages)	Withheld in part, section 19	Uphold
	No title	January 28, 1977 Summary	127 – 130 (4 pages)	Withheld in full, section 19	Uphold
	No title	September 16, 1976 Memorandum	131 – 133 (3 pages)	Withheld in full, section 19	Uphold
	No title	November 22, 1976 Correspondence	134 (1 page)	Withheld in full, section 19	Uphold
21	RG 1 – 568 Native Bands, Reserves and Land Claims Files: Six Nation Band – Draft report re: Legal Issues on Beds of Waterways May 16, 1981	April 16, 1981 Draft report	1 – 9 (9 pages)	Withheld in full, section 19	Uphold