

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-3306

Appeal PA09-122-2

Ministry of Community Safety and Correctional Services

February 13, 2014

**Summary:** The appellant made a multi-part request for access to information relating to specified protests which occurred in 2008. This appeal deals with that part of the request relating to the OPP video recordings taken at the locations of the protests. The ministry identified two dvds as the responsive records and denied access to the recordings on the basis of the mandatory personal privacy exemption in section 21(1) and the discretionary law enforcement exemptions in section 14(1)(c), (e), (g) and (l). In this order, the adjudicator upholds the ministry's decision to withhold one of the records on the basis of the exemption in section 21(1). The other record is ordered disclosed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 14(1)(c), (e), (g), (l), 21(1)(a), 21(2)(a), 21(2)(f), 21(3)(b).

**Cases Considered:** *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

### OVERVIEW:

[1] The appellant, a representative of a human rights organization, made a multi-part request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to specified protests which occurred in 2008. The appellant subsequently provided the ministry with signed consent forms from a number

of the protestors consenting to the disclosure of their personal information to the appellant. The ministry identified responsive records and issued decision letters denying access to them. The ministry claimed the application of the mandatory exemption in section 21(1) (personal privacy) of the *Act*, citing the non-application of the exception in section 21(1)(a) (consent) and the relevance of the factor in section 21(2)(f) (highly sensitive).

[2] This appeal deals with only one part of the appellant's request, which relates to access to OPP videotapes taken at the protests.

[3] During mediation, the parties disagreed over whether the appellant had provided the ministry with valid signed consents for the purposes of the exception in section 21(2)(a). At adjudication, the prior adjudicator assigned to this appeal found that the signed consent forms from individuals that the appellant had provided to the ministry were valid for the purposes of the first requirement of section 21(1)(a) and ordered the ministry to issue new access decisions with respect to the records at issue. The file was then transferred to a subsequent adjudicator to complete the inquiry.

[4] Subsequently, the ministry issued 13 decision letters to the appellant in relation to the records at issue in this appeal. In its decisions, the ministry denied access to the videotapes, claiming the application of the discretionary exemptions in:

- sections 14(1)(c) and (g) (law enforcement), 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate commission of an unlawful act);
- section 49(a) (discretion to refuse requester's own information); and
- section 49(b) (personal privacy).

[5] The ministry also claimed the application of the mandatory exemption in section 21(1) (personal privacy), citing the presumption in section 21(3)(b) and the factor in section 21(2)(f).

[6] The appellant advised this office that he wished to appeal the ministry's decisions. Furthermore, at mediation, the appellant raised the issue of the possible application of the public interest override in section 23 of the *Act*.

[7] During the inquiry into this appeal, the prior adjudicators sought and received representations from the appellant and the ministry. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. The file was then transferred to me to complete the order.

[8] In this order, I uphold the ministry's decision in part.

## **RECORDS:**

[9] The records consist of two dvds with each dvd containing approximately 15 minutes of recordings. One of the dvds contains recordings of a blockade occurring at night and the other shows a protest or blockade which took place during the day. I refer to the records as the night and day recordings.

## **ISSUES:**

- A. Do the law enforcement exemptions at sections 14(1)(c), (e), (g) and/or (l) apply to the records?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption at section 21(1) of the *Act* apply?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?

## **DISCUSSION:**

### **A. Do the law enforcement exemptions at sections 14(1)(c), (e), (g) and/or (l) apply to the records?**

[10] The ministry submits that sections 14(1)(c), (e), (g) and (l) apply to both of the recordings at issue. These sections state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

[11] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

[12] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.<sup>1</sup>
- a police investigation into a possible violation of the *Criminal Code*.<sup>2</sup>
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.<sup>3</sup>

[13] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>4</sup>

[14] Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.<sup>5</sup>

[15] In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other

---

<sup>1</sup> Orders M-16 and MO-1245.

<sup>2</sup> Orders M-202 and PO-2085.

<sup>3</sup> Order MO-1416.

<sup>4</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>5</sup> Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.<sup>6</sup>

[16] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.<sup>7</sup>

[17] Prior to making representations on the specific subsections, the ministry asked that I take the following into consideration:

- The video records were created strictly for law enforcement purposes, including the monitoring of illegal protests, surveillance, intelligence gathering and recording illegal activities.
- The video recording is used to create an accurate record of an event.
- In the event of a prosecution, video records are used for evidentiary purposes.
- The videos are useful for surveillance and intelligence gathering purposes.
- I should follow established jurisprudence that the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>8</sup>

[18] The appellant also submitted that the following should be considered with respect to the ministry's decision to apply the law enforcement exemptions:

- The possibility that the ministry is withholding the information not because of any legitimate law enforcement concern, but out of a desire to shield the OPP and its Commissioner from potentially embarrassing or discrediting revelations.
- The ministry's decision letter of March 16, 2011 with respect to the appellant's request for 16 OPP records only referred to the mandatory personal privacy exemptions in section 21. The law enforcement exemptions were not claimed until February 6, 2013. If the law enforcement exemptions were of a real concern to the ministry, why did it not claim the exemptions in its first decision letter.

---

<sup>6</sup> *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

<sup>7</sup> Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

<sup>8</sup> *Ontario (Attorney General) v. Fineberg*, cited above.

- Protests are not intrinsically “illegal” except when roads and/or rail lines are blocked. No one was charged with engaging in an illegal protest as there is no offence under the *Criminal Code*.
- The videos were taken more than five years ago and all prosecutions arising from the incidents in June of 2007 and April of 2008 were completed more than two years ago.
- The events which are the subject of the videos were public events often on or adjacent to public roads. Many people were aware that the OPP was conducting video recordings and taking photographs.
- At times, there was also at least one journalist with the news media photographing police, protesters, supporters and observers.

***Section 14(1)(c): investigative techniques and procedures***

[19] In order to meet the “investigative technique or procedure” test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.<sup>9</sup>

[20] The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.<sup>10</sup>

[21] The ministry states that, in this appeal, the use of the video records by law enforcement is a specific technique that is not generally known by the public. The ministry submits that the videos record the procedures used by law enforcement for patrolling contentious and volatile disputes and how law enforcement responds to illegal highway blockades. The ministry’s representations also include representations which were not provided to the appellant due to confidentiality concerns, in accordance with the criteria in the IPC’s *Practice Direction 7*.

[22] I have reviewed both the videos, keeping in mind the ministry’s confidential and non-confidential representations. I am unable to find that disclosure of either of these records could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. The day recording consists of a video recording what appears to be a scene in the distance and then a recording of the vandalism of some equipment next to a road. The recording also depicts images that had been spray painted on some concrete supports and dividers. Neither the record itself or the circumstances surrounding the creation of the record establish that

---

<sup>9</sup> Orders P-170, P-1487, MO-2347-I and PO-2751.

<sup>10</sup> Orders PO-2034 and P-1340.

disclosure of the record could reasonably result in the harms set out in section 14(1)(c) of the *Act* or those which are referred to in the ministry's confidential representations.

[23] Nor am I able to find that disclosure of the night-time recording could reasonably be expected to result in the harms set out in the ministry's confidential representations. The ministry's confidential representations refer to harms which do not relate to investigative techniques or procedures and instead refer to common police practices. I find the ministry has not established that this video record contains the "specific techniques or procedures" used by law enforcement as referred to in paragraph 24 of the ministry's representations.

[24] Regarding the harm set out in paragraph 25 of the ministry's confidential representations, I find that it is not reasonable to expect that disclosure of the records could undermine the effectiveness of video technology. Based on my review, there is nothing in the records or the ministry's representations to establish that the recordings were done in a covert manner or in an attempt to disguise the true intent of the recording.

[25] In summary, I find that section 14(1)(c) does not apply to the records.

***14(1)(e): life or physical safety***

[26] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.<sup>11</sup>

[27] The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.<sup>12</sup>

[28] The ministry submits that it applied this exemption because it was concerned about the life and physical safety of the OPP and it also made confidential representations on the possible harm.

[29] The appellant submits that I consider whether the ministry has established the harm in section 14(1)(e) and submits the following:

According to research which I have conducted for Amnesty, 47 OPP officers testified in open court with respect to the Mohawk protests and related incidents in April of 2008 during the 39 day trial of 13 Mohawk protesters in the case of *R. v. Daniel John Doreen, et al.* Has the ministry supplied any evidence to prove that the lives and physical safety of any of these officers have been jeopardized by their testimony in a contentious and, at times, emotional trial?

---

<sup>11</sup> Order PO-2003.

<sup>12</sup> Order PO-1817-R.

[30] I find that the ministry has not established that disclosure of the records could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. The ministry's confidential representations focus on the potential harm to OPP officers based on the circumstances in this area of the province and the relationship between the OPP officers and Mohawk protesters. I find the ministry's arguments are not compelling and contain mere speculation of harm. The ministry does not identify the individuals in the records, nor does it identify the officers who do not appear in the record, but instead operated the camera which recorded the videos. I acknowledge that the land rights dispute is ongoing and that the OPP officers engage in potentially dangerous work, but the ministry has not established the necessary connection between the disclosure of these records and the harms it alleges could occur.

[31] Furthermore, the harm set out in the ministry's confidential representations in paragraph 29(b) is not borne out by my review of the records.

[32] Accordingly, I find that section 14(1)(e) does not apply.

***Section 14(1)(g): law enforcement intelligence information***

[33] The term "intelligence information" means:

Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.<sup>13</sup>

[34] The ministry states that the records contain intelligence information collected as part of the policing operation of this dispute and that disclosure would reveal law enforcement intelligence information. The ministry's specific representations on this issue were not shared with the appellant due to confidentiality concerns.

[35] The appellant submits that the video recording of the Mohawk protests and occupations were usually done in the open and were visible. The appellant disputes that the recordings were done covertly and argues that the information does not constitute intelligence information. The appellant further submits that the intent of the recordings was not to collect intelligence information, but to gather evidence for the purpose of prosecuting the protesters. Lastly, the appellant argues that the ministry should not be able to argue that the records contain intelligence information within the meaning of section 14(1)(g) and also argue that the information was compiled and is

---

<sup>13</sup> Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).



identifiable as part of an investigation into a possible violation of law in order to claim the presumption in section 21(3)(b).

[36] Based on my review, I find that the ministry has not established the application of the exemption in section 14(1)(g). There is nothing in the records indicating that they were meant to be a covert collection of information. In fact, the night time video contains a reference by a protester to the fact that they were aware they were being filmed. The ministry itself acknowledged in its representations that, in the event of a prosecution, the records were to be used as evidence.

[37] I find the information in the records is not intelligence information and I find that section 14(1)(g) does not apply.

***Section 14(1)(l): commission of an unlawful act or control of crime***

[38] The ministry submits that disclosure of the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The ministry states the following as one of its reasons for the application of this exemption:

We are concerned that the disclosure of the records could augment tensions in an existing dispute, which could in turn lead to further acrimony and perhaps even unlawful activities.

[39] Some of the ministry's representations on this issue were also withheld due to confidentiality concerns.

[40] The ministry's confidential and non-confidential representations do not establish the application of this exemption. Similar to my reasons above, I find the ministry's representations are speculative and do not provide detailed and convincing evidence of the harm it anticipates. While I acknowledge that it is difficult to predict future events in a law enforcement context, I find the ministry has not provided sufficient evidence to establish the anticipated harms. I find that section 14(1)(l) does not apply to either of the videos at issue.

[41] As I have found that the law enforcement exemptions in section 14(1) do not apply to the records, I will now proceed to consider the application of the personal privacy exemption in section 21(1).

**B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[42] The ministry submits that the records contain recorded information about identifiable individuals, including individuals' faces, voices, home addresses, phone numbers, names and motor vehicle license plates. In order to determine which sections

of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (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;

[43] 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.<sup>14</sup>

[44] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>15</sup>

[45] The ministry submits that the individuals in the daytime video recording are identifiable despite the fact that the recording was done at a distance and the images are blurry. The ministry states:

...even when video images are blurry or distant, enhancements may be used to identify individuals. The ministry submits that new technology must be taken into consideration when determining whether blurry or otherwise distant video images contain personal information.

[46] In my view, it is not reasonable to expect that any individual who appears in the day recording could be identified. The video recording appears to have been taken from some distance and the video is distorted by both the distance of the camera and the refraction of the light on the heated highway. The ministry's argument that technology could be used to somehow enhance the video in order to produce recorded information about an identifiable individual is not credible and unsubstantiated, given the quality of the video in this portion of the record. I find the day recording does not contain recorded information about identifiable individuals. As the exemption in section 21(1) only applies to records containing personal information, I find this record not exempt under section 21(1). Furthermore, as I have found this record not exempt under section 14(1), I will order the ministry to disclose it.

[47] The ministry submits that the night recording contains images of individual's faces and recorded voices. The ministry further submits that this recording contains an individual's name, home address, phone number and several license plate numbers. I find that the night recording contains the recorded images of individuals' faces and voices. This office has found in prior orders that recorded images of individuals contained on videos are the individual's personal information within the meaning of section 2(1) of the *Act*.<sup>16</sup> I agree with the findings in these orders and find that the recorded images and voices of individuals contained in the recording constitute the "personal information" of those identifiable individuals.

[48] I further find that I can discern the names of a few individuals from the audio portion of the recording. I find that the names of the individuals constitute these

---

<sup>14</sup> Order 11.

<sup>15</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>16</sup> PO-3140 and PO-2033-I.

individuals' personal information within the meaning of paragraph (h) of the definition of "personal information" in section 2(1).

[49] Lastly, the record contains footage of several license plate numbers. Prior orders of this office have also held that license plate numbers of individuals are the recorded information of identifiable individuals and as such constitute their personal information for the purposes of section 2(1) of the *Act*.<sup>17</sup> Accordingly, I find that the license plate numbers constitute the personal information of identifiable individuals.

[50] I was unable from my review and close listening to the recording to discern the home address or phone number of any individual. I further find that the recording does not contain any recorded information about the appellant such that sections 49(a) and (b) would apply to the information at issue. I note that the ministry did not identify information relating to the appellant nor did they submit representations to this effect.

[51] In summary, I find that the night recording contains the personal information of identifiable individuals whereas; the day recording does not contain any personal information.

### **C. Does the mandatory exemption at section 21(1) of the *Act* apply?**

[52] The ministry submits that disclosure of the record could constitute an unjustified invasion of the privacy of individuals whose personal information is contained in the records. 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.

[53] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[54] If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21. In this case, only the exception in section 21(1)(a) is relevant.

#### ***21(1)(a): consent***

[55] For section 21(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. Secondly, the record, which is the subject matter of the request, must be one to which the individual is entitled to have access.

---

<sup>17</sup> MO-2021.

[56] In this case, the appellant submits that it obtained signed and witnessed consent forms from 24 individuals which relate to the 16 videos that are responsive to its multi-part request. On May 31, 2012, Adjudicator Colin Bhattacharjee determined that the signed consents were valid for the purposes of the first requirement of section 21(1)(a) of the *Act*. I must consider whether the record at issue is one to which the consenting parties would be entitled, if they had made the request.

[57] The ministry was asked to consider the consents when it made its decision with respect to the records. However, the ministry did not address whether the individuals who consented to the disclosure of their personal information are included in the videos at issue in this appeal. Moreover, the appellant is unable to match the consents with the individuals on the video. Unfortunately, I have no way to independently match the consents provided by the appellant with the individuals in the video. In light of these circumstances, I am unable to find that the record at issue is one to which the consenting parties would be entitled to access. Accordingly, I find that the exception in section 21(1)(a) does not apply and I must now go on to consider the exception in section 21(1)(f).

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

[58] 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):

- section 21(2) lists “relevant circumstances” or factors that must be considered;
- section 21(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy;
- section 21(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy despite section 21(3).

[59] In the circumstances, section 21(4) does not apply to the records at issue. The ministry submits that the factor favouring non-disclosure in section 21(2)(f) and the presumption in section 21(3)(b) are relevant. The appellant submits that the factor supporting disclosure in section 21(2)(a) is 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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[60] The ministry submits that the video recordings were created primarily for monitoring and intelligence gathering purposes. However, the ministry also argues that as the video records illegal activities they could have been used as part of an investigation into a possible violation of law. The ministry submits that its stronger case against non-disclosure is the factor in section 21(2)(f) and states that the personal information is "highly sensitive" for the following reasons:

- [the record] records individuals many or most of whom were likely not aware that their personal information was being collected by the OPP;
- [the record] records individuals who are not aware that their personal information is subject to disclosure in the manner contemplated by this appeal;
- [the record] records situations that are fraught with tension, involving illegal protests, and confrontations or possible confrontations with the OPP;
- the personal information is between 5 and 6 years old. It is reasonable to expect these individuals would be shocked to know that their personal information was being disclosed such a long time after it had first been collected;
- once the personal information is disclosed it ceases to be protected and can be publicized without any regard to the individuals to whom it belongs; and
- the personal information was collected in the context of police activities and as such is inherently highly sensitive. The ministry cites Order P-1618 where this office held that section 21(2)(f) was a

relevant consideration in regard to personal information about an individuals' contacts with the OPP as complainants, witnesses or suspects.

[61] The appellant submits that the factor in section 21(2)(a) is relevant as disclosure of the personal information in the record is desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny. The appellant states:

Amnesty's previous attempts to subject the OPP's policing of the April of 2008 Mohawk land rights protests to public scrutiny have been persistent but unsuccessful...In its May of 2011 public brief, Amnesty recommended that the OPP "undertake a systemic review of the OPP response to the Culbertson Tract protests in ...April 2008, if such a review has not already been carried out, and make the findings public." Amnesty has not been able to determine whether or not such a review has taken place with respect to police handling of the Culbertson Tract Protests. If it has, the results have not been made public.

Amnesty first called for a review of police handling of the Tyendinaga protests in November 2008. At the time, Amnesty presented evidence of a disproportionate police response that contemplated use of lethal force against unarmed protestors asserting rights protected by treaty and law. These concerns have since been substantiated by ample eyewitness testimony and evidence presented at trial by police and defendants. In May of 2011, Amnesty again urged the Government of Ontario to "establish an independent, impartial probe into OPP handling of the Culbertson Tract protests on ...April 21 – 28, 2008 and make the findings of such a probe public. Three years later, no such probe has been undertaken.

To sum up, since November 2008, Amnesty has repeatedly attempted - without success to persuade the Government of Ontario to undertaken an independent impartial probe of the disproportionate response by the OPP to the Mohawk land rights protest in April of 2008. Amnesty has also urged the OPP – without success to undertake the kind of systemic, internal review which the OPP recommended at the Ipperwash Inquiry. In light of this background, we submit that section 21(2)(a) of the *Act* justifies any invasion of personal privacy or personal distress on the grounds that "the disclosure is desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny", a public scrutiny which is long overdue.

**21(2)(a): public scrutiny**

[62] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>18</sup>

[63] The video at issue is clearly an OPP video recording of a blockade and represents government activity relating to the individuals whose personal information is at issue. I further recognize the appellant's organized efforts to encourage public scrutiny of the government's response to the Mohawk protests. I find that the factor in section 21(2)(a) is relevant to my consideration of whether disclosure of the personal information constitutes an unjustified invasion of the individuals' personal privacy.

**21(2)(f): highly sensitive**

[64] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>19</sup>

[65] I find the ministry has also established that section 21(2)(f) is also relevant to my determination. I accept the ministry's argument that disclosure would cause significant personal distress to those individuals whose personal information is contained within the recording for the following reasons:

- The personal information is now 6 years old and it is reasonable to expect that the individuals whose activities are recorded on the video would suffer significant personal distress to find that this information was now going to be disclosed.
- The personal information relates to OPP surveillance of alleged illegal activity. I accept that disclosure of this personal information would inherently be highly sensitive because of the nature of the activity being recorded.

**21(3)(b): investigation into violation of law**

[66] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>20</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>21</sup>

---

<sup>18</sup> Order P-1134.

<sup>19</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>20</sup> Orders P-242 and MO-2235.

<sup>21</sup> Orders MO-2213, PO-1849 and PO-2608.



[67] I referred to the ministry's representations above, where it claimed that the records contain both intelligence information that should be withheld under section 14(1)(g) and personal information compiled and identifiable into a possible violation of law whose disclosure is presumed to be an unjustified invasion of personal privacy in section 21(3)(b). As noted above, I did not find that the records contained intelligence information. Instead, based on my review of the record and the parties' representations, I find that the record contains personal information which was compiled and is identifiable as part of an investigation into a possible violation of law.

[68] Accordingly, I find that the section 21(3)(b) presumption is relevant to my determination. The OPP officer who recorded the activities of the protesters was present at the blockade in order to record the activities taking place and to identify any illegal activities. I accept that the personal information contained in the recording was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. Accordingly, disclosure of the personal information is presumed to be an unjustified invasion of the individual's personal privacy.

[69] As I have found that the presumption in section 21(3)(b) and the factor in section 21(2)(f) is relevant to my determination of whether disclosure of the personal information in the record would result in an unjustified invasion of personal privacy, I find that the mandatory exemption in section 21(1) applies to the record. While I found the factor in section 21(2)(a) to be relevant, once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).<sup>22</sup> As such, I find that the record is exempt under section 21(1). As the appellant has raised the issue of the possible application of the public interest override in section 23, I will consider whether there is a compelling public interest in the disclosure of the record which would outweigh the purpose of the section 21 exemption.

**D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?**

[70] I have found the nighttime video recording is exempt under section 21(1). I will now consider whether there is a compelling public interest in the disclosure of this record that would outweigh the purpose of this exemption.

[71] 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.

---

<sup>22</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[72] 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.

[73] 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.<sup>23</sup>

### **Compelling public interest**

[74] 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.<sup>24</sup> 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.<sup>25</sup>

[75] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>26</sup>

[76] The appellant submits that there is a compelling public interest in the OPP’s handling of the Mohawk land rights protests at Tyendinaga in April 2008 and provides the following evidence:

- In June 2012, the United Nations Committee Against Torture expressed its concern “about reports on the excessive use of force by law enforcement officers often in the context of crowd control at federal and provincial levels, with particular reference to indigenous land-related protests at Ipperwash and Tyendinaga...Furthermore, the ... the government of Ontario should conduct an inquiry into the Ontario Provincial Police handling of incidents at Tyendinaga...”
- The video records which Amnesty [the organization which the appellant represents] is seeking pertain to the policing of Indigenous

---

<sup>23</sup>Order P-244.

<sup>24</sup>Orders P-984 and PO-2607.

<sup>25</sup>Orders P-984 and PO-2556.

<sup>26</sup>Order P-984.

land rights protests, an issue that was the subject of an extensive provincial public inquiry, the Ipperwash Inquiry, the total cost of which was \$13.3 million. One of the objectives of Amnesty's research is to determine whether the recommendations generated through the Inquiry, and subsequently endorsed by the provincial government, are in fact being put into practice by the OPP. It is Amnesty's view that the implementation of the recommendations of a high level, \$13 million provincial inquiry is a matter of *compelling public interest*. [emphasis in original]

- A crucial issue for Amnesty is: Do the OPP videos illustrate that the OPP was applying its own *Framework for Police Preparedness for Aboriginal Critical Incidents (Framework)*...Due to the cost and importance of the Report of the Ipperwash inquiry, the OPP's *Framework* and the absence of any independent, third-party evaluation of its implementation, we submit that the disclosure of the video is a matter of *compelling public interest*. [emphasis in original]
- The underlying issues that led to the 2008 protests – the failure to reach a fair and timely resolution of the Culbertson Tract land claim and the failure of any level of government to impose a moratorium on development until the land claim is settled – remain unresolved...In fact, there is the looming prospect that further tensions and confrontations could be triggered by new development projects by private landowners or the Town of Deseronto on the Culbertson Tract. During the 2012 and 2013 "Idle No More" protests, Aboriginal rights activists temporarily shut down roads and railway lines across Canada, including the Tyendinaga area. In this context, it is in the public interest that we learn as much as possible about the policing of previous Mohawk land rights protests and take whatever steps necessary to reduce the potential for violence and harm.
- There is a *compelling public interest* [emphasis in original] because of the high costs to the Ontario taxpayer of the OPP's approach to policing of Mohawk protests with respect to the Culbertson Tract. Information provided by the OPP in decision letters....reveals that from April of 2007 when the OPP took over the policing of Mohawk protests and occupations on the Culbertson Tract from the Tyendinaga Mohawk Police Service (TMPS) to December 31, 2010, the OPP had spent more than \$9 million dollars and had used more than 137,000 police officer hours on policing the Mohawk protests on the Culbertson Tract.

[77] The appellant submits that there is a compelling public interest in the disclosure of all the unedited OPP videos taken on the afternoon of April 25, 2008 with respect to:

- The alleged sighting of a “long gun” on the hill or ridge at the Thurlow Aggregates Quarry
- The approach of a red pick-up truck from the south on the Deseronto/Boundary Road towards the north OPP road barricade and the subsequent arrests of [two named individuals].
- The exit of four teenagers from the Thurlow Aggregates quarry and their approach to and arrival at the OPP north barricade on the Deseronto/Boundary Road near its junction with Bridge Street, and
- The approach of Mohawk community members to the OPP barricade at the junction of Lower Slash Road and the Deseronto/Boundary Road.

[78] The appellant also submits that its organization, Amnesty, is a respected and reputable organization dedicated to the protection and promotion of human rights. It was awarded the Nobel Peace Prize for its human rights work around the world and it systematically and independently researches the facts of individual cases and patterns of human rights abuses.

[79] The ministry’s representations on the application of section 23 are not helpful, but the ministry states the following regarding the issue of the land disputes:

Although the videos were made five to six years ago, the dispute that led to the record being creating remains ongoing and as contentious and volatile as ever. In December 2012, and in January 2013, there were more blockades in the area, this time disrupting rail traffic.

[80] The ministry also submits that the OPP will continue to play a role in the policing of these disputes.

[81] I acknowledge that the appellant organization’s mandate is researching and reporting on human rights issues with the goal of preventing human rights abuses. I find that the appellant has established that there is a compelling public interest with respect to records that address the province’s policing of the Mohawk land disputes. I further find that this issue is one which the government has expended both money and resources to deal with. Both the ministry and the appellant emphasize that the land disputes, which are the subject of the responsive record, are still a contentious issue today.

[82] However, I must consider whether there is a relationship between the record at issue in this appeal and the *Act’s* central purpose of shedding light on the operations of government. In the record at issue, the OPP officer recording the video is not shown on camera and neither are any other OPP officers or government officials. The video

simply shows the blockade and the individuals involved. The video does not contain any of the information identified by the appellant above i.e. the sighting of a gun, the approach of a red pick-up truck, the exit of four teenagers or the approach of Mohawk community members to an OPP barricade. In summary, I conclude that the disclosure of the contents of this video would not shed light on the policing of Mohawk protests by the government. I find there is not a compelling public interest in the disclosure of the record which I have found exempt under section 21(1).

[83] Accordingly, I find that section 23 does not apply and the night recording is exempt under section 21(1).

**ORDER:**

1. I uphold the ministry's decision to withhold the dvd containing the night recording.
2. I order the ministry to disclose the dvd containing the day recording by providing the appellant with a copy of the video by **March 17, 2014**.
3. In order to verify with the compliance of Order provision 2, I reserve the right to require the ministry to provide me with a copy of the video sent to the appellant.

Original Signed By:  
Stephanie Haly  
Adjudicator

February 13, 2014

---