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

INTERIM ORDER PO-2286-I

Appeal PA-000370-4

Ministry of Community Safety and Correctional Services

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BACKGROUND

Interim Order PO-2221-I is one in a series of orders involving the Ministry of Community Safety and Correctional Services (the Ministry) and an appellant who is seeking access to videotape and photographic records produced during the occupation of Ipperwash Provincial Park (Ipperwash) in September 1995.

Interim Order PO-2221-I included two provisions (Provisions 3 and 4) requiring Ontario Provincial Police (OPP) Superintendent Susan Dunn to provide affidavit evidence attesting to various possible discrepancies in certain identified records and outstanding issues relating to compliance with a previous related order, Interim Order PO-2033-I. The process to be followed and the scope of the evidence to be provided were outlined in these order provisions. Interim Order PO-2221-I also included two different provisions (Provisions 5 and 6) requiring Superintendent Dunn and other current and former officials of the OPP with knowledge of activities taking place at Ipperwash to provide affidavit evidence attesting to the steps taken to identify and locate all records responsive to the appellant's request (the search affidavits).

After reviewing the first affidavit from Superintendent Dunn dealing with Provisions 3 and 4, which was shared with the appellant, I determined that it was inadequate, for reasons outlined in Interim Order PO-2338-I. I determined it would be necessary for me to summon Superintendent Dunn and other OPP officials, pursuant to my authority under section 52(8) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), and require them to attend before me to give sworn evidence relating to the various outstanding discrepancy issues. Before my scheduled oral inquiry on this matter took place, OPP Commissioner Gwen Boniface asked her RCMP counterpart for a review of the discrepancy issues identified in Provisions 3 and 4 of Interim Order PO-2221-I. After receiving assurances that I would be provided with a copy of the report outlining the results of the RCMP review for use in my inquiry, I decided to adjourn the oral inquiry. I subsequently received a copy of the RCMP report (the Report) as well as a supplementary affidavit from Superintendent Dunn. The Ministry is taking the position that certain portions of the Report may not be shared with the appellant. The primary purpose of this interim order is to rule on this issue.

In response to Provisions 5 and 6 of Interim Order PO-2221-I, I received a search affidavit from Superintendent Dunn, one search affidavit from each of 23 current and/or former OPP officials, and one "will say" statement from a 24th official who is now residing outside Canada. The Ministry took the position that these search affidavits could not be shared with the appellant. After receiving representations from the Ministry and the appellant on this sharing issue, I issued Interim Order PO-2263-I, which found that most of the information contained in the affidavits could be shared. The Ministry asked me to reconsider my finding in Interim Order PO-2263-I as it relates to portions of the various search affidavits. I provided the appellant with a copy of the portions of the affidavits not covered by the reconsideration request. My decision on the reconsideration request will be dealt with separately and I will not address it in this interim order.

In my discussion of sharing issues in Interim Order PO-2263-I, I acknowledged that small portions of certain search affidavits submitted in response to Provisions 5 and 6 of Interim Order PO-2221-I touched on matters relating to outstanding discrepancy issues regarding Provisions 3

and 4 of that previous order. I decided at that time to defer my findings regarding whether these sections of the relevant search affidavits could be shared with the appellant until I had considered the sharing issues relating to other aspects of Provisions 3 and 4. Accordingly, I will address the outstanding issues relating to these search affidavits in this interim order.

I am also in receipt of a second affidavit from Superintendent Dunn that deals with the discrepancy issues outlined in Provisions 3 and 4. This interim order will also deal with whether this affidavit can be shared with the appellant.

The Ministry provided representations in support of its position that portions of the RCMP report should not be shared. These representations were shared with the appellant, who responded with representations. The appellant's representations were in turn shared with the Ministry, which submitted further representations in reply.

PRELIMINARY MATTERS:

STATUS OF THE RCMP REPORT

The Ministry makes the following statement in its first set of representations:

> The RCMP Report was provided to the Assistant Commissioner by [counsel representing OPP Commissioner Boniface] under cover of a letter dated March 23, 2004. In that letter, [Commissioner Boniface's counsel] confirmed the "undertaking" of counsel for the Assistant Commissioner, that the "report will be treated as if the subject of a request pursuant to the *Act*".

The Ministry returns to this subject in its reply representations dealing with the section 15(b) exception - information received in confidence from another government. After repeating the statement from the initial representations, the Ministry goes on to state:

> In other words, it was expressly understood and agreed that the report was <u>not</u> to be treated as part of the Ministry's representations for the purpose of this inquiry. It was understood and agreed that the report would be dealt with as if a request for access under the *Act* had been made with respect to it. Accordingly, the Ministry had every expectation of confidentiality with respect to the record when it was provided to the IPC.

Commissioner Boniface's counsel contacted my counsel in March of this year to advise that Commissioner Boniface had decided to request a review and report by the RCMP on matters that were the subject of this inquiry. At the time, my counsel obtained assurances that I would be provided with a copy of the RCMP Report, and explained the process for sharing representations made in the context of an inquiry under the *Act*. Although Ministry counsel understands the provisions of *Practice Direction 7* that govern sharing matters, Commissioner Boniface's counsel was new to the process and not necessarily aware of these provisions. In that context, my counsel explained that the Report would be treated in the normal course as part of the

Ministry's representations in my inquiry, and that the confidentiality criteria set out in *Practice Direction 7* would be applied in determining whether any portions of the Report should not be shared with the appellant. In particular, my counsel explained the provisions of confidentiality criterion 5(b) and its potential application to a record such as the Report.

At no point during this discussion was it "expressly understood and agreed that the Report was not to be treated as part of the Ministry's representations for the purpose of this inquiry", as suggested by Ministry counsel. Had that been the case, the March 23, 2004 letter from Commissioner Boniface's counsel would no doubt have said so. Instead, he refers to the language of criterion 5(b), albeit imprecisely. It is also significant to point out that the March 23, 2004 letter goes on to state:

> I expect that [Ministry counsel], will make submissions to you regarding the dissemination of the report, including any law enforcement, confidentiality or public interest consideration that should inform its treatment. However, since [Ministry counsel] has been away from the office for several days, and given the desirability that you receive the report as soon as possible, it seemed preferable to provide the report to you now rather than await the Ministry's submissions. I am sure that your office and [Ministry counsel] will be in communication over the timing of those submissions.

Ministry counsel is well aware of the confidentiality criteria described in *Practice Direction 7* and how they apply to representations received from the parties during the course of an inquiry. Indeed, the application of these criteria has been the subject of interim orders issued by me during the course of the lengthy proceedings stemming from the appellant's request. Ministry counsel is also aware of this office's *Code of Procedure*, which governs the conduct of an inquiry under the *Act*. Section 3 of the *Code* defines "representations" as "the documents, other evidence and/or arguments a party provides to an Adjudicator in an inquiry". The Report, which was provided to me during the course of this inquiry, clearly meets the requirements of this definition.

It should have been clearly understood by all concerned that "the dissemination of the report", to quote the phrase used by Commissioner Boniface's counsel, would be governed by the confidentiality criteria under section 5 of *Practice Direction 7*. The Ministry is well aware that this office does not "disseminate" records subject to an appeal, but rather orders institutions to disclose non-exempt records or portions of records directly to a requester pursuant to section 54(1) of the *Act*. The statement that Ministry counsel "will make submissions ... regarding the dissemination of the report" makes it clear that Commissioner Boniface's counsel also understood how I intended to deal with the Report in the context of my inquiry - as part of the Ministry's representations.

I find it quite surprising, indeed disturbing, that Ministry counsel would raise a semantic argument of this nature at this late stage of these proceedings in an effort to convince me that "it was expressly understood and agreed" that the normal processes of this office would not be followed with respect to the Report. I can think of no reason why I would ever have agreed to

treat the Report, which speaks to the very issues identified in Provisions 3 and 4 of Interim Order PO-2221-I, as anything other than "a document provided during an inquiry", as defined in section 3 of the *Code of Procedure*. And if I had decided to consider departing from the normal process for whatever reason, Ministry counsel should be aware based on my past practices in this lengthy and complex appeal, that I would have provided the Ministry and the appellant with an opportunity to make submissions on whether I should make such a departure before deciding whether to do so.

The Report forms part of the Ministry's representations in this inquiry, and it will be shared with the appellant in the normal course, subject to the application of the confidential criteria in section 5 of *Practice Direction 7*.

CUSTODY AND CONTROL

The Ministry prefaces its first set of representations by noting that "there is a real concern as to whether [the Ministry] has 'custody' or 'control' of the RCMP report within the meaning of s. 10 of the *Act*." On its own, this statement appears to question my jurisdiction to deal with the Report in this inquiry. However, the Ministry immediately goes on to state that it is not necessary for me to decide that issue "because the RCMP has authorized the release of the report, subject to certain severances".

I must assume from this rather cryptic statement that the Ministry does not specifically deny that the Report is in its custody or under its control within the meaning of section 10, and that I may therefore proceed to dispose of the sharing issue on the basis of the application of *Practice Direction 7*. In other words, if I find that the withheld portions of the Report do not, in fact, fit within the confidentiality criteria, I will not be faced with the argument that I lack jurisdiction to share these portions of the Report with the appellant on the ground that the entire Report is outside the scope of the *Act* because it is not in the Ministry's custody or control. In this connection, I would observe that at no point did Commissioner Boniface's counsel suggest that the Report, once presented by the RCMP to his client, would not be within the custody or under the control of the Ministry.

More importantly, in my view, any issue of custody or control is simply not germane to a question of sharing evidence and representations provided to this office in an inquiry. If an institution provides me with information and asks me to take it into account in reaching my decision, it cannot dictate how that information is ultimately treated or impose any restrictions based on arguments that are foreign to the normal adjudicative processes. A tribunal is "master of its own processes" and, subject to rules of natural justice and procedural fairness, has the authority to devise procedures that will "achieve a certain balance between the need for fairness, efficiency and predictability of outcome" (See: *Baker v. Canada (Minister of Citizenship and Culture)* (1999), 174 D.L.R. (4th) 193 at 210-214 (S.C.C.); *Knight v. Bd. of Ed. of Indian Head School Div. No. 19* (1990), 69 D.L.R. (4th) 489 at 512 per L'Heureux-Dubé J. (S.C.C.)). As I indicated in Interim Order PO-2263-I, the Divisional Court has confirmed that this office has authority to decide whether and the extent to which representations should be shared among the parties, provided that the confidentiality criteria in *Practice Direction 7* are adequately

considered and applied (See *Toronto District School Board v. Ontario (Information and Privacy Commissioner),* [2002] O.J. No. 4631 (Div. Ct.)).

Nonetheless, given that the custody or control issue has been raised, I have decided to consider and dispose of it before proceeding to apply the confidentiality criteria.

Although the Ministry has not provided specific representations on this issue, it made the following submissions by way of general background:

> In February of 2004, by reason of the questions raised by the IPC in the public realm, the Commissioner of the OPP requested an independent investigation by the RCMP into the integrity of the videotapes and audiotapes in issue.
>
> The RCMP Report was provided by Chief Superintendent AI McIntyre [sic] of the RCMP to the Commissioner of the OPP on or about March 17, 2004. The report is marked "Confidential" and has a "Security Classification/Designation" of "Protected A".
>
> Chief McIntyre advised that while the "Protected A" designation described as "low-sensitive", nevertheless a document is "designated protected" when its "unauthorized disclosure ... could reasonably be expected to cause harm to an ongoing or anticipated law-enforcement investigation" or "hinder effective law enforcement by detailing sensitive protective, operational or administrative strategies and procedures".
>
> Chief Superintendent McIntyre "authorize(d) the OPP to release my report to [Assistant Commissioner Mitchinson]". Chief Superintendent McIntyre stated "(n)o further distribution of same is approved and should others seek access, they will have to follow the appropriate and current process relative to accessing federal agency files and documents",
>
> The RCMP subsequently authorized the release of the report, subject to certain severances.

In response to the Ministry's submissions, the appellant takes the position that the Report is in the Ministry's custody or control. She submits:

> Should the Assistant Commissioner decide that he should address that question, the appellant submits that the report and attachments are clearly in the custody or the control of the Ministry.
>
> The report is in the possession of the OPP. As Commissioner Linden held in Order P-120, "physical possession of a record is the best evidence of *custody,* and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession".

> This appeal is not one of those "rare cases". The report was prepared by the RCMP at the request of the OPP, to be submitted to the OPP for use for the OPP's own purposes. The report was created in response to a request from OPP Commissioner Boniface for "the assistance of the Royal Canadian Mounted Police to technically examine the records provided and submit their opinion respecting the identified issues". The report is even titled: "Assist to Ontario Provincial Police." The RCMP was essentially acting as an agent for the OPP, fulfilling a specific mandate set by the OPP Commissioner, examining only the exhibits provided by the OPP (see paragraph 14 of the RCMP report).
>
> Moreover, Appendices 2 through 6 (inclusive) are all documents that were prepared by the OPP, including logs describing the videotapes that have already been disclosed to the appellant.
>
> Even in the documents prepared by the RCMP, much of the severed information is OPP information. For example, the severance at paragraph 10 of the RCMP report is apparently a description of the affidavits sworn by the OPP for submission to the Assistant Commissioner, affidavits which were ordered to be disclosed to the appellant in Interim Order PO-2263-I.
>
> In light of the foregoing, the report and appendices are clearly in the custody or control of the Ministry.

The terms "custody" and "control" are defined in *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at pages 329 and 384, as follows:

> **Custody**: The keeping, guarding, care**,** watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected.
>
> **Control**: Power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee.

In *Ontario (Criminal Code Review Board) v. Doe* (1999), 47 O.R. (3d) 201, the Ontario Court of Appeal held that the word "control" should be given a broad, liberal and purposive construction in order to give effect to the purposes of the *Act* that citizens should have a meaningful right of access to information (at pp. 209-210). The Court cited with approval the following passage from the decision of the Federal Court of Appeal *in Canada Post Corporation v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (at pp. 244-245):

> The notion of control referred to in [the *Act*] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the

> information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the government can dispose of or which are under the lasting or ultimate control of the government.
>
> ....
>
> It is not in the power of this Court to cut down the broad meaning of the word "control", as there is nothing in the *Act* which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the *Act* to government information.

In determining whether records are in the custody or under the control of an institution within the meaning of section 10(1) of the *Act*, this office will consider, among other relevant indicators, several non-exhaustive factors first articulated by former Commissioner Sidney B. Linden in Order P-120, and since used in many subsequent appeals:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or an employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

Clearly, the Report is in the custody of the Ministry. It was submitted to Commissioner Boniface, at her request, and it can be implied from the circumstances that "the keeping,

guarding, care, watch, inspection, preservation or security" of the Report is the responsibility of Commissioner Boniface, whose agency is part of the Ministry for the purposes of the *Act*.

The Report has been provided to me by the Ministry as part of its representations in this inquiry. While various components of the report were prepared by the RCMP, and not by the Ministry or the OPP, it was prepared at the OPP's request for the benefit and use of the OPP and the Ministry in response to questions that I raised concerning what has been called the "discrepancy" issues in this inquiry. I have been provided with no evidence that the Report or any part of it was prepared for the RCMP's own purposes or that any specific portions of the Report are being withheld at the RCMP's request or direction. Indeed, the portions the Ministry has asked me not to share coincide with portions of other documents the Ministry has asked me to withhold from the appellant. None of this information has a direct bearing on any independent concerns that the RCMP would have regarding its own law enforcement functions.

Given the purpose of the Report, the fact that it was created at the request of the OPP for the benefit and use of the Ministry and the OPP, the fact that the OPP and the Ministry have actual lawful possession of it and have provided copies of it to me, I find that it is also under the control of the Ministry.

SHARING OF REPRESENTATIONS PROCEDURE:

INTRODUCTION

The processes and procedures followed by the Office of the Information and Privacy Commissioner (the IPC) in conducting inquiries under the *Act* are contained in the published *Code of Procedure* and accompanying *Practice Directions*. *Practice Direction 7* deals with sharing of representations provided by the parties during the course of an inquiry, and identifies the criteria for withholding representations. Sections 5 and 6 of *Practice Direction 7* reads as follows:

> 5.The Adjudicator may withhold information contained in a party's representations where:
>
> (a) disclosure of the information would reveal the substance of a record claimed to be exempt; or
>
> (b) the information would be exempt if contained in a record subject to the *Act;* or
>
> (c) the information should not be disclosed to the other party for another reason.
>
> 6.For the purposes of section 5(c), the Adjudicator will apply the following test:
>
> (i) the party communicated the information to the IPC in a

> confidence that it would not be disclosed to the other party;
>
> (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;
>
> (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
>
> (iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit thereby gained for the correct disposal of the appeal.

The Divisional Court has upheld the application of the confidentiality criteria set out in *Practice Direction 7* as a proper means for the IPC to determine whether representations of one party can be withheld from another party during the course of an appeal (*Toronto District School Board*).

The Ministry submits that the Report should not be shared for two reasons:

1. The law enforcement exemption in section 14 of the *Act* applies;

2. Its disclosure could reasonably be expected to reveal information received from another level of government or its agencies within the meaning of section 15(b) of the *Act*.

Although the Ministry does not refer specifically to any of the confidentiality criteria in *Practice Direction 7*, it is clear that the section 5(b) criterion is the only one with potential application in the context of the Ministry's representations.

THE RCMP REPORT

Law Enforcement

Section 14(2)(a) - law enforcement report

The Ministry identifies section 14(2)(a) as the specific provision of section 14 it is relying on. This section reads:

> A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with the law;

representations of the parties

The Ministry submits:

> The Ministry submits that s.14(2)(a) of the *Act* applies [to] the report. Subsection 14(2)(a) has three elements: first, the record must be a "report". Second, the report must have been prepared "in the course of law enforcement, inspections or investigation"; and third, the report must have been "prepared ... by an agency which has the function of enforcing and regulating compliance with the law". (See Interim Order PO-2054-I at p.14.)
>
> In Order 200, former Commissioner Tom Wright stated as follows with respect to the meaning of "report":
>
> > The word 'report' is not defined in the *Act*. However, it is my view that in order to satisfy the first part of the test, i.e., to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.
>
> The Ministry does not agree that a "report" must necessarily include an "account of the results of the collation and consideration of information". However, it is not necessary to decide that issue in this case, because the RCMP report clearly contains the opinion and conclusions of the RCMP with respect to the integrity of the tapes.
>
> The report was prepared "in the course of an "investigation" by the RCMP into the integrity of the tapes in issue [sic]. The investigation by the RCMP could have led to a law enforcement proceeding. (See Order PO-1779 at pages 6 to 8.)
>
> There can be no dispute that the RCMP is "an agency which has the function of enforcing and regulating compliance with the law". Accordingly, the Ministry submits that s.14(2)(a) applies to the report.
>
> The Ministry also relies upon its representations with respect to access to the [search] affidavits and its reply representations, and upon its representations with respect to access to the technical information and records, and upon its reply representations.

The appellant agrees with the 3-part test identified by the Ministry and applied in previous orders of this office. The appellant also does not dispute that the third part of the test is satisfied, namely that the RCMP has the function of enforcing and regulating compliance with the law. However, she takes issue with the application of the first two parts of the test. In the appellant's view, the Report is not a "report" as this office has interpreted that term, and the Report was not

prepared in the course of "law enforcement, inspections or investigation". She submits:

> Section 14(2)(a) of the *Act* requires consideration of whether <u>each</u> record falls within the exemption: Order PO-1959. Accordingly, each attachment must be considered separately [appellant's emphasis].
>
> Although the RCMP is an agency that has the function of enforcing and regulating compliance with many laws, the RCMP report and attachments do not meet the first part of the s. 14(2)(a) test, and the report and several of the attachments also do not meet the second branch of the test.
>
> In order to satisfy the first part of the test, that is to constitute a "report", the record must consist of a formal statement or account of the results of the collation and consideration of information. Results do not include mere observations or recordings of fact. See e.g. Orders M-1048, MO-1238.
>
> An outline of the steps taken by the investigating officer during the course of an investigation constitutes "mere observations and recordings of fact and is not a formal statement or account of the results of the investigation." Order M-682 (per Assistant Commissioner Mitchinson); see also Order M-397.
>
> In Order M-17, Commissioner Wright held that notes compiled by an investigator on an "Information Sheet" did not constitute a report, as "the record is not a formal statement or account of the results of the Licensing Enforcement Officer's work but a series of entries outlining his observations with respect to his investigation of the appellant's complaint".
>
> The appendices from which information has been severed in this case are "mere observations and recordings of fact". Appendices 3, 4 and 5, the OPP's video and audio logs, are officers' notes of their minute-by-minute observations of the surveillance conducted at Ipperwash Provincial Park. Appendix 6 is also a recording of fact - a list of the exhibits given by the OPP to the RCMP. Appendix 7, a Request for Analysis, lists factual information to provide background to the technical analyst. It is clearly preliminary to any report. Appendix 8 outlines the tests performed by the technical analyst and his observations with respect to his investigation of the integrity of the videotapes. It is also a preliminary description of the analysis, rather than a "formal statement or account of the results" of the RCMP's investigation.
>
> With respect to the March 17, 2004 Investigation Report of Chief Superintendent Macintyre, although some comments might be considered evaluative, as Adjudicator [Sherry] Liang held in Order PO-1988, this is not determinative if the essential nature of the document is to describe observations and facts. Chief Superintendent Macintyre's report is a day-by-day account, written on a standard pre-printed form, of the steps taken by the RCMP in response to the OPP

> Commissioner's request. The few comments that might be considered evaluative do not detract from its essential nature as a descriptive document. Moreover, the Ministry must justify its severances, and it has only severed factual, descriptive parts of the document, not the conclusion section: see Order PO-2054-I (reconsideration request rejected in Order PO-2086-R).
>
> Furthermore, although the video and audio logs created by the OPP during the Ipperwash protest (Appendices 4, 5 and 6 [sic – should be Appendices 3, 4, and 5]) were made in the course of law enforcement, the documents created by the OPP and RCMP in response to the OPP Commissioner's request (i.e. the report and Appendices 7 and 8) are not. There is no reference in either the OPP Commissioner's letter of request (Appendix 2 to the report) or in Chief Superintendent Macintyre's report to anticipated law enforcement proceedings. Rather, as noted in the Ministry's submissions …, the Commissioner's request was made "by reason of the questions raised by the IPC in the public realm". Similarly, at page 2 of Appendix 7, in the Request for Analysis, Chief Superintendent Macintyre describes the background to the request as being that "the credibility of the Ontario Provincial Police has been publicly questioned". The OPP's desire to restore its credibility "in the public realm" is not a "law enforcement" purpose within the meaning of the *Act*.

In reply representations, the Ministry takes issue with the appellant's characterization of the various components of the Report and restates its position that the Report relates to an investigation that could lead to a law enforcement proceeding:

> The Appellant argues that the report does not meet the first and second elements of the test under s. 14(2)(a) of the *Act*. …
>
> For the purpose of her argument, the Appellant parses the report into parts and argues that each part of the report should be considered separately.
>
> In support of her argument, the Appellant relies upon Order PO-1959. However, Order PO-1959 is not authority for the proposition that each <u>part</u> of a record must meet all three elements of the test. Order PO-1959 states that each <u>record</u> must meet the test. The Ministry submits that the correct approach is to consider the RCMP report as a whole [Ministry's emphasis].
>
> Although the Ministry does not concede that in order "to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information", the Ministry submits that the RCMP report meets the first part of the test, because it clearly contains the opinions and conclusions of the RCMP with respect to the integrity of the tapes.
>
> The fact that some <u>parts</u> of the report contain factual observations does not mean that the entire record is not a report. It is to be expected in a report that the

> opinions and conclusions will be prefaced by factual observations [Ministry's emphasis].
>
> The Appellant also argues that because the severances made by the Ministry are of "factual, descriptive parts of the documents" and "not the conclusion section", the exemption in s. 14(2)(a) does not apply. The Ministry reiterates that the question is whether the exemption applies to the record and not to each part of the report.
>
> In any event, the Ministry notes that in its representations, it also relies upon its representations with respect to the applicability of s. 14(1) and s. 21 to the affidavits and to the technical information and records. …
>
> The report was prepared "in the course of" an "investigation" by the RCMP into the integrity of the tapes in issue. Notwithstanding that one of the reasons for the request to the RCMP was the "the credibility of the Ontario Provincial Police has been publicly questioned", the fact is that had the investigation by the RCMP revealed a problem with the tapes, it could have led to a law enforcement proceeding. This is sufficient to satisfy the second part of the test. (See Order PO-1779 at pages 6 to 8.)

analysis and findings

I accept, as does the appellant, that the RCMP is "an agency which has the function of enforcing and regulating compliance with the law". However, I do not accept that the entire document together with all of the appendices constitutes a "report" as this office has interpreted this term; nor do I accept that all of these appendices were "prepared" by the RCMP simply because they are appended to the March 17, 2004 document that was, in fact, prepared by the RCMP's Chief Superintendent McIntyre.

However, my principal basis for rejecting the Ministry's position is that neither the entire Report nor any individual part of it was prepared by the RCMP "in the course of law enforcement, inspections or investigations".

"Law enforcement" is defined at section 2(1) of the *Act* to mean

> (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, and
>
> (c) the conduct of proceedings referred to in clause (b);

The Report provided to me by the Ministry is titled "Assist to Ontario Provincial Police", and consists of a document dated March 16, 2004 titled "Investigation Report" and 8 appendices described in the body of this document. At paragraph 1 of the Report, Chief Superintendent Macintyre refers to the purpose of the RCMP's involvement in this matter as responding to a request by OPP Commissioner Boniface for "an external review of a matter by a RCMP senior officer". At paragraph 4 he refers to a copy of the formal request from Commissioner Boniface (Appendix 2), which he describes as a "mandate letter". Commissioner Boniface's request letter dated February 18, 2004 provides some background information with respect to my current inquiry and my previous orders in these proceedings, and goes on to describe the RCMP's mandate in preparing the Report as follows:

> As a result, it was the opinion of [Assistant Commissioner Mitchinson] that in fact the Ministry had not fully responded to the request citing a number of issues surrounding the quality, apparent deficiencies, gaps and other related technical issues. Specifically, the integrity of the video records has been brought into question by the requestor and [Assistant Commissioner Mitchinson].
>
> So far, it still remains the view of the appellant and [Assistant Commissioner Mitchinson] that the Ministry's (OPP) response is inadequate.
>
> That being the case, I am requesting the assistance of the Royal Canadian Mounted Police to technically examine the records provided and submit their opinion respecting the identified issues. An officer is requested to collect the records at issue and commence the examination. Appropriate RCMP documentation will be prepared to begin the process once the officer is assigned.

Appendix 6 to the Report is a letter from an OPP Detective Inspector listing the original videotapes that the OPP was turning over to Chief Superintendent Macintyre "for examination", and Appendix 7 is an undated document titled "Request for Analysis Examination of Exhibits" from the Chief Superintendent to the RCMP's Director of Technical Operations, which states in its salient parts as follows:

> This priority request for examination and analysis is based on a formal request for assistance from the Commissioner of the Ontario Provincial Police (OPP) to the Commissioner of the RCMP.
>
> ...
>
> As a result of a myriad of issues, the credibility of the [OPP] has been publicly questioned relative to the authenticity and completeness of audio and video tapes, and in the manner and condition in which alleged copies of same were provided to those seeking access pursuant to the *Freedom on Information and Protection of Privacy Act* of Ontario.

Exhibit 7 goes on to set out a series of questions under a section titled "Specific Request(s) for Analysis" which, at items 1 through 9, deal with the specific questions I raised concerning certain videotapes in Provisions 3 and 4 of Interim Order PO-2221-I. Items 10 and 11 specifically refer to my inquiry as the context in which the analysis is being requested by Commissioner Boniface and undertaken by the RCMP.

The questions I raised in Interim Order PO-2221-I are the only issues addressed in the Report submitted by Chief Superintendent Macintyre. As well, the specific tapes identified in Appendix 8 and titled "Case Report Audio and Video Analysis" and an attached "Exhibit Report" lists the very tapes and portions of tapes identified in Interim Order PO-2221-I, and no others.

Accordingly, it is clear that the purpose of the RCMP's involvement in this matter was to assist Commissioner Boniface in assessing the physical condition of the videotape records and determining:

1. whether they are original records; and

2. the reason or reasons for certain "discrepancies" in the tapes which I identified in Order PO-2221-I.

Nothing in the Report itself, its appendices or any other material I have been provided indicates that the RCMP was involved in any activity either on its own initiative or at the request or on behalf of Commissioner Boniface that could be described as "law enforcement", in the sense that it would or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed. Based on the material before me, I find no basis for the Ministry's assertion in its reply representations that "had the investigation by the RCMP revealed a problem with the tapes, it could have led to a law enforcement proceeding".

Rather, both the RCMP's activity and the contents of the Report and appendices are in the nature of a technical examination or fact-finding exercise, undertaken for the sole purpose of assisting Commissioner Boniface, and by extension the OPP and the Ministry, in providing evidence and making representations with respect to the specific questions I raised in Interim Order PO-2221-I regarding the physical attributes of the videotapes. Neither my questions nor the analysis reflected in the Report involve any alleged wrongdoing on the part of any organization or individual in violation of any law. The only authority I have during the course of an inquiry is to "dispose of the issues raised by the appeal" under section 54(1) under the *Act*. This order-making authority does not include an ability to impose penalties or sanctions.

It is also important to state that nothing in the material before me suggests that Commissioner Boniface asked the RCMP to conduct its examination with a view to determining if there was some basis for commencing law enforcement proceedings against any individual.

Further, while the RCMP is a law enforcement agency, the activity in question - making a technical assessment and analysis of records - is not exclusively, or even primarily, a law enforcement activity. It is an activity engaged in by many bodies on a regular basis (such as

auditors, for example) that perform no law enforcement role. Indeed, the Report describes the type of testing methods any expert retained by me would have followed had the RCMP not performed this function, and my expert would clearly not be engaging in law enforcement activities. The fact that Commissioner Boniface chose to ask the RCMP to perform this review function, presumably due to its familiarity with the technologies in question and/or its independence from the OPP, does not transform an otherwise neutral technical or fact-finding examination into an exercise in law enforcement as the *Act* defines that term.

In my view, Order PO-1779 cited by the Ministry also does not advance its position. In that case, I accepted that an OPP investigation into the conduct of police officers on another police force "was, in fact, conducted in order to determine whether criminal charges could or should be laid." That is not the case here.

For all of these reasons, I find that the RCMP report is not "a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with the law" within the meaning of section 14(2)(a). Accordingly, the confidential criterion in section 5(b) of *Practice Direction 7* has not been established as it relates to this exemption.

While this finding is sufficient to dispose of the Ministry' section 14(2)(a) submission, I also want to comment on the appellant's submission that neither the Report as a whole nor any part of it is a "report" for the purposes of this exemption.

As stated earlier, previous orders have found that in order to qualify as a "report", a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, "results" would not include mere observations or recordings of fact (see Order 200). In addition, section 14(2)(a) requires consideration of whether each record at issue falls within that exemption (see Order PO-1959).

I agree with the appellant, in part, that certain appendices to the document do not constitute a "report" or part of a "report" as this office has interpreted that term. In Order PO-1959, relied on by the appellant, Adjudicator Liang outlined the approach this office takes when an institution submits that a document consisting of several discrete records constitutes a "report" within the meaning of this exemption. In rejecting the submissions of the Ministry of the Attorney General in Order PO-1959 that the entire content of a Special Investigation Unit [SIU] "brief" constituted a "report", Adjudicator Liang described the records at issue and made her findings as follows:

> Apart from Record 46, the Ministry submits that the records are all part of the SIU's "investigative brief" of the incident. Record 2, the SIU Director's Report to the Attorney General of Ontario constitutes a summary of some of the more material information contained in the other records, together with the SIU Director's analysis of that information and ultimate decision in respect of whether criminal charges should be laid. The Ministry submits that the records in total provide an overview of the incident and a description of the events prior to, during and subsequent to the occurrence which was investigated. Further, it is

said that all of the records form an integral part of the SIU's Director's Report in that it is these materials which are reviewed by the Director in arriving at an ultimate disposition of the case, which is then formally articulated in the Report. It is submitted that these materials are more than "mere observations or recordings of fact." The Director's Report and the rest of the records, considered together, comprise a formal statement of the results of the collation and consideration of information and, consequently, the information contained in these records constitutes a "report" for the purposes of part 1 of the section 14(2)(a) test.

Essentially, the Ministry's submission is that all of the records must be considered together for the purposes of the application of section 14(2)(a). I am unable to accept this submission, and I find that section 14(2)(a) requires consideration of whether *each* record at issue falls within that exemption.

....

Although I find that Record 2 (the Report of the Director) meets the requirements of section 14(2)(a), it does not follow that all the material which may have been gathered together, placed before and considered by the Director before arriving at his conclusions is also exempt, without further analysis. In this respect, I agree with the appellant that section 14(2)(a) does not provide a "blanket exemption" covering all records which the Ministry views as constituting part of the SIU's "investigative brief."

In the case before me, the SIU investigation file consists of numerous different records from diverse sources. As the representations of the Ministry describe, they are essentially a compilation of information obtained during the course of the SIU's investigation and the steps taken by SIU staff in the discharge of that investigative jurisdiction, and include documentary materials obtained by the SIU or generated by the SIU. The Director's decision is based upon a review of all the records, but his analysis and decision is contained in Record 2 (the Director's Report) alone.

I accept ... that Record 2 qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of a formal statement of the results of the collation and consideration of information. I also find that Record 4, the cover letter to Record 2, qualifies for exemption, as the two records together can reasonably be viewed as forming the report to the Attorney General from the SIU Director.

I also accept that Records 3, 11, 38, 43a and 44 qualify as "reports". Rather than consisting of mere observations or recordings of fact, they also include some consideration of the information collected during the course of the investigation in question.

I find that none of the remaining records at issue meet the definition of a "report".

> To elaborate further on some of these, Records 15, 19, 23 to 27 and 29 to 37 consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations ...

Applying this approach to the document under consideration here, I have no in difficulty finding that the section titled "Investigation Report", as well as the various documents comprising Appendix 8 titled "Case Report Audio and Video Analysis" and the appended "Exhibit Report", consist of a formal statement or account of the results of the collation and consideration of information and thus satisfy the first part of the test as a "report" within the meaning of section 14(2)(a).

However, none of the remaining appendices constitute "reports". Clearly, Chief Superintendent Macintyre's resume (Appendix 1), Commissioner Boniface's request letter (Appendix 2), the letter listing the videotapes (Appendix 6) and the RCMP's internal "Request for Analysis Examination of Exhibits" (Appendix 7) do not fall within the scope of "reports", as defined above. The video logs and audio logs (Appendices 3, 4 and 5) are, in my view, analogous to the incident reports, supplementary reports and police officers' notes at issue in Order PO-1959, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. None of these documents can accurately be said to consist of a formal statement or account of the results of the collation and consideration of information, as required in order to meet the definition of "report".

Accordingly, even the Report was prepared in the course of law enforcement, inspections or investigations, which it was not, Appendices 1-7 of the Report would not satisfy the first part of the test for exemption under section 14(2)(a), and thereby fail to satisfy confidentiality criterion 5(b) of *Practice Direction 7*.

Other grounds raised by the Ministry

As noted earlier, the Ministry concludes its first set of representations under the heading "law enforcement" with the following statement:

> The Ministry also relies upon its representations with respect to access to the affidavits and its reply representations, and upon its representations with respect to access to the technical information and records, and upon its reply representations.

The appellant's representations do not respond to this statement.

In its reply representations, the Ministry states:

> In any event, the Ministry notes that in its [first set of] representations, it also

> relies upon its representations with respect to the applicability of s. 14(1) and s. 21 to the affidavits and to the technical information and records. …

The Ministry's first set of representations, in fact, makes no specific reference to the exemptions at sections 14(1) and 21. Leaving aside this inaccuracy, it should be clear to the Ministry that what might be described as a "shot gun" approach such as this is not an acceptable way to make submissions on why representations should not be shared with another party. Sections 3 and 4 of *Practice Direction 7* state:

> 3. A party providing representations shall indicate clearly and in detail, in its representations, which information in its representations, if any, the party wishes the Adjudicator to withhold from the other party or parties.
>
> 4. A party seeking to have the Adjudicator withhold information in its representations from the other party or parties, shall explain clearly and in detail the reasons for its request, with specific reference to the following criteria [set out at section 5].

I am not prepared to speculate blindly as to which part or parts of the Ministry's lengthy representations on withholding the affidavits and technical information supplied in other facets of this appeal apply to which part or parts of the various documents comprising the Report. Not only is this unfair to the appellant in her ability to respond, it unduly complicates and protracts what is a purely procedural aspect of this already lengthy proceeding.

To the extent that the Ministry considers that the basis for its submission should be "obvious" to me, I make the following comments and findings.

The information severed form the Report can be divided into the following categories:

1. the names of OPP officer who swore search affidavits and which were also provided to the RCMP for the purposes of its technical examination of the videotapes (Appendix 7);

2. highly generic descriptions of the recording devices, their location, the means of recording, and the means by which certain recordings came about (Appendix 7);

3. the names of specific OPP officers associated with specific videotapes or recording devices (Appendices 3, 6 and 8);

4. certain times associated with equipment-related events or recording observations, as well as OPP officers' names appearing on the video and audio logs for the Maintenance Shed and the video log for the Gatehouse (Appendices 3, 4 and 5);

5. a general reason advanced by the OPP for the gaps identified in the videotapes (Appendix 7);

6. a general description of a document provided to the RCMP Director of Technical Operations (Appendix 7);

7. a brief outline of possible future contacts between the RCMP and OPP and the reason for same, together with the name of an OPP officer (Appendix 7);

8. brief descriptions of tests performed by the RCMP on the videotapes, reasons for "loss of the audio signal", certain features of a video recording that would indicate it is a copy, a specific feature of FOI Videotape 6 and a reason for concluding that Videotape 7 has not been erased or recorded over (Appendix 8); and

9. the model number of one videocassette recorder (Appendix 8).

In its representations concerning technical information provided to me at an earlier stage of this appeal, the Ministry submits that the following provisions of section 14 are relevant considerations in determining whether these representations can be shared with the appellant:

> 14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (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.

I have already determined in my discussion of section 14(2)(a) above that the RCMP's role in examining the records or preparing its report is not a law enforcement matter.

Further, and in any event, I have not been provided with sufficient evidence or argument on which I could base a finding that disclosing the withheld portions of the Report could reasonably be expected to:

- interfere with any law enforcement matter in which the RCMP is or has been engaged (s. 14(1)(a)), including any investigation (s. 14(1)(b)); or

- reveal any law enforcement technique employed by the RCMP in the course of conducting its examination and making its report (s. 14(1)(c)).

As far as section 14(1)(c) is concerned, I do not consider a general description of the kinds of tests performed by the RCMP in examining the tapes to constitute investigative techniques or procedures in relation to law enforcement simply because these tests were performed by the RCMP. They are more accurately described at best as "techniques" that are within the knowledge of individuals proficient in the operation of video and audio equipment, many of whom clearly have no role in law enforcement activities.

I have also not been provided with sufficient information and reasoning to persuade me that disclosing the withheld portions of the Report could reasonably be expected to:

- interfere with any RCMP law enforcement interests relating to the endangerment of the life or physical safety of an individual (s. 14(1)(e))

- interfere with the gathering or revealing of law enforcement intelligence information (s. 14(1)(g)); or

- facilitate the commission of an unlawful act or hampering the control of crime (s. 14(1)(l)).

Accordingly, as it relates to the role of the RCMP in this matter, I am unable to conclude that section 14(1) would apply to any information contained in the Report.

Some of the withheld information in the Report relates to law enforcement activities of the OPP in September 1995 at Ipperwash. For the most part, this consists of generic descriptions of the equipment used and their location, as well as references to the OPP's activities with respect to the use of this equipment. The appellant already knows much of this information, either as a result of having been given access to the physical tapes and their contents, or as a result of other information generated and provided to the appellant in these proceedings.

To the extent that any information severed from the RCMP report and appendices is not already known to the appellant, or is not already known in the exact terms described, I am not satisfied that the exemption at section 14(1) would apply to any of it, with one limited exception. Two

pages of Appendix 8 contain a total of four references to the model number of one videocassette recorder. This number was also contained in the Ministry's representations on the technical information, which I have not yet dealt with. I have decided to withhold this model number at this time, pending my ruling on the sharing issues relating to the Ministry's representations on sharing the technical information.

As far as the section 21 reference in the Ministry's "law enforcement" representations is concerned, I can only assume that it relates to the names of OPP officers wherever they appear in the Report and its various appendices, and that the Ministry is taking the position that these names associated with other information in the Report constitutes the "personal information" of OPP officers within the meaning of section 2(1) of the *Act*. I have already dealt with this issue in my previous orders, most recently in Order PO-2263-I concerning the Ministry's request that I not disclose the names of the OPP officers who swore the search affidavits. In Order PO-2263-I, I stated:

> As the appellant points out, and as I found in my previous orders in this inquiry, the search affidavits relate to activities undertaken by the police officials in their professional capacities and thus do not constitute their "personal information" as defined in section 2(1) of the *Act*. Their identities and participation in the events in question are, for the most part, already known to the appellant and, in fact, the names of these individuals were provided to me by the appellant in the first place.

This conclusion applies equally to the names of the officers where they appear in the Report and appendices, including names that were not provided to me by the appellant, but rather by the Ministry. The name references relate exclusively to the officers in the context of their professional capacities, and do not constitute their "personal information".

In arriving at this conclusion, I have also considered the submission made by the Ministry in its request for reconsideration of Order PO-2263-I to the effect that questions involving the physical attributes or integrity of the videotapes somehow amount to complaints against individual OPP officers. As discussed in my decision disposing of this reconsideration request, I find that there have been no complaints advanced against any individual officers and that neither the RCMP's examination and Report nor my inquiry concerning the videotapes amounts to an investigation into or otherwise relates to a complaint against any individual officer.

Accordingly, to the extent that I am correct in assuming that the Ministry is arguing that section 21 applies because the severances contain the personal information of OPP officers, I also reject this submission.

In summary, I find that the requirements of confidentiality criterion 5(b) have not been established as they relate to the potential application of sections 14 or 21 of the *Act*.

Information Received in Confidence

The Ministry also argues that the Report would be exempt under section 15(b) of the *Act* because

disclosing it "could reasonably be expected to ... reveal information received in confidence from another level of government or its agencies". This section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > Reveal information received in confidence from another government or its agencies by an institution;

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern (Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)).

To establish the requirements of section 15(b), an institution must demonstrate that disclosure of the withheld portions of the Report "could reasonably be expected to" lead to the specified result. To meet this test, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient (*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

representations of the parties

The Ministry submits:

> In this case, the report contains information with respect to the analysis performed and the conclusions reached by the RCMP. The information in the report was received in confidence by the OPP from the RCMP. The report was marked "Confidential" and has a "Security Classification/Designation" of "Protected A". The RCMP advised the OPP that its "unauthorized disclosure" was prohibited.
>
> The RCMP is an agency of the federal government. The IPC has previously accepted that the RCMP is the agent of another level of government. (See Interim Order P-1636 at p.14.)

The appellant makes the following submissions in response:

> Appendices 3 through 6 inclusive clearly do not fall within the scope of this exemption, as they are all OPP (not RCMP) documents. A record that is sent by an institution that is subject to the *Act* to another government agency and then returned to the institution does not qualify for exemption under s. 15(b) of the *Act*: see Order P-278.

Equally, all or virtually all of the information severed from the RCMP-created records consists of factual information supplied to the RCMP by the OPP. As a result, the severed information does not "reveal information received from another government or its agencies". The situation is comparable to that considered in Orders M-128 and M-839 regarding the RCMP's Canadian Police Information Centre ("CPIC"). Although CPIC is a federal system, much of the information contained in it was originally supplied by provincial or municipal police forces. [The IPC] has consistently held that only the retrieval of information originally supplied to CPIC by the RCMP can be considered to be "received" from the RCMP. Even though CPIC documents are federal government records, a municipal or provincial police force cannot rely on s. 9(1) of the *Municipal Freedom of Information and Protection of Privacy Act* or the parallel s. 15 (b) of the *Act* to exempt information that it originally provided to CPIC.

Similarly, in this case, the OPP cannot rely on s. 15(b) of the *Act* to exempt information that it originally provided to the RCMP, even when it is recited in an RCMP document. This is consistent with the purpose of s. 15(b), which is to exempt information of the other government, not the institution's own information.

Furthermore, the RCMP report and attachments were not submitted to the Ministry in confidence. It was always anticipated that the report would be submitted to the Assistant Commissioner. The very purpose of the report was to respond to the concerns raised in the Assistant Commissioner's earlier orders in this appeal. The Ministry advised the Assistant Commissioner, in the context of this appeal, of the fact that the report was being prepared. The Request for Analysis (Appendix 7) makes it clear that the RCMP was aware that the report had to be completed in time for submission at or before the oral inquiry. (Ultimately, the oral inquiry was postponed to allow time for receipt and consideration of the report.) Accordingly, it would have been evident to the RCMP and the Ministry at the time that the report was completed that it would be used as evidence in this appeal. Accordingly, the RCMP could only reasonably have expected confidentiality with respect to severances that satisfy the criteria in section 5 of *Practice Direction 7.*

The Assistant Commissioner's recent ruling in Order PO-2263-I (at page 29) that the search affidavits were not submitted in confidence is thus instructive:

> First, the Ministry, like any other party submitting representations in an inquiry under the *Act*, would be aware that its representations - in the form of both evidence and legal submissions or argument - may be shared with the other party in the appeal based on the application of the confidentiality criteria in section 5 of *Practice Direction 7*. Clearly, the parties in the appeal, who have

> participated in a number of separate inquiries which followed this procedure are well aware of how representations are treated. Submitting representations with a mere assertion that they are being provided in confidence is not sufficient to establish confidentiality. Confidentiality is determined on the basis of the application of the criteria in section 5.
>
> Second, any expectation of confidence in relation to representations made in the context of an inquiry must be reasonable. It would not be reasonable to expect that information previously communicated to a party during the course of an inquiry or made public through the publication of an order would be treated confidentially, regardless of whether an assertion of confidentiality is made. A great deal of information has been shared with the appellant during the course of this lengthy appeal, including correspondence, Notices of Inquiry, representations, six public orders, and even Superintendent Dunn's first discrepancy affidavit. Yet, in claiming confidentiality criteria 5(c) to the entire content of all search affidavits, the Ministry is in effect asking me to treat previously-communication (sic) information as confidential ... [appellant's emphasis]

Similarly, the severances from the RCMP report and attachments include:

> (a) descriptions in the OPP video and audio logs (Appendices 3, 4 and 5) of records that have already been disclosed to the appellant;
>
> (b) notations in those logs of the times when videotapes were changed, which is information that is apparent to the appellant from the time codes and labels of the videotapes already disclosed to her;
>
> (c) descriptions of markings on videotapes already shown to or included on the labels of the copies disclosed to the appellant; and
>
> (d) descriptions of or excerpts from affidavits already ordered to be disclosed to the appellant.

There is no reasonable expectation that such information would be treated confidentially. Accordingly, the third branch of the s. 15(b) test has not been established by the Ministry.

Although the Ministry has not relied upon s. 21 of the *Act*, it is apparent that many

of the severances are of names or identifying information of OPP officers or of native protesters who were described in the video and audio logs at Appendices 3, 4 and 5. This clearly is not confidential information of the RCMP, and could not reasonably have been expected to be treated confidentially given the numerous previous rulings in this appeal that such information is not confidential. This issue was most recently addressed in Order PO-2263-I, in which the Assistant Commissioner held at page 41:

> As far as the names of the [OPP] deponents are concerned, I find no basis for withholding them. As the appellant points out, and as I found in my previous orders in this inquiry, the search affidavits relate to activities undertaken by police officials in their professional capacities and thus do not constitute their "personal information" as defined in section 2(1) of the *Act*. Their identities and participation in the events in question are, for the most part, already known to the appellant and, in fact, the names of these individuals were provided to me by the appellant in the first place. I also find that the officers' names in association with the contents of particular affidavits must be linked in order for the appellant to adequately respond to the search issue.
>
> Turning to the names of the protesters included in the affidavits, in most cases these individuals have consented to their identities being shared with the appellant in these proceedings. In addition, as the appellant points out, I have already determined, pursuant to section 23 of the *Act;* that there is a compelling public interest in disclosing this identifying information that clearly outweighs the purpose of the privacy exemption as it relates to these affected individuals. [appellant's emphasis]

Similarly, with respect to "technical information", such as the fact that the audio taping was "paused" (the word is only partially blacked out at p. 15 of Appendix 5), there is no reasonable expectation of confidentiality. As the Assistant Commissioner held in Order PO-.2263-1 at p. 20:

> ... I am not persuaded that disclosing them would reveal investigative techniques that are not already well known to be the subject of this inquiry, particularly in light of the fact that the actual photographs and video surveillance tapes under consideration have already been disclosed to the appellant.

In reply, the Ministry submits:

> Again, the argument of the Appellant is premised on parsing the report into sections and applying the s. 15(b) of the *Act* to each part of the record.

> The Ministry submits that when viewed as a whole, disclosure of the record would reveal "information received in confidence from another government". The fact that the Ministry has chosen, with the agreement of the RCMP, to disclose certain information in the record, does not mean that the exemption does not apply to the record.
>
> The Appellant's argument that the report was not received in confidence is incorrect. As stated in … the Ministry's representations, the RCMP Report was provided to the Assistant Commissioner by [Commissioner Boniface's counsel] under cover of a letter dated March 23, 2004. In that letter, [Commissioner Boniface's counsel] confirmed the "undertaking" of counsel for the Assistant Commissioner, that the "report will be treated as if the subject of a request pursuant to the *Act*". In other words, it was expressly understood and agreed that the report was <u>not</u> to be treated as part of the Ministry's representations for the purpose of this inquiry. It was understood and agreed that the report would be dealt with as if a request for access under the *Act* had been made with respect to it. Accordingly, the Ministry had every expectation of confidentiality with respect to the record when it was provided to the IPC [Ministry's emphasis].

analysis and findings

I am essentially in agreement with the appellant's position on section 15(b) and its application to the Report. Specifically, I find that:

1. Section 15(b) cannot be used to shelter a record or information contained in a record that has been sent by an institution that is subject to the *Act* to another government agency and then returned to the originating institution. (See Orders P-278, M-128 and M-839). I also agree with the appellant that most of the information the Ministry asks me to withhold in this case fits that characterization.

2. There can be no reasonable expectation of confidentiality on the part of the RCMP, the OPP or the Ministry with respect to any information that has already been communicated to the appellant in the course of the inquiry, including:

   (a) information that can be gleaned from reviewing the videotapes or from the descriptions of markings on videotapes already shown to or included on the labels of copies of the tapes disclosed to the appellant; and

   (b) with respect to the RCMP's references to the OPP officers' search affidavits, information in those affidavits that is to be shared with the appellant pursuant to Order PO-2263-I.

3. The RCMP, the Ministry and the OPP are or should have been aware that any representations provided in this appeal, including the evidence contained in the RCMP Report, may be shared with the appellant based on the application of the confidentiality criteria in section 5 of *Practice Direction 7*. The quotation in the appellant's representations from Interim Order PO-2263-I makes this clear. The presence of a "confidential" security classification/designation on the Report does not in and of itself negate the application of *Practice Direction 7* in the circumstances of this case.

Finally, I would repeat my earlier finding that the Report forms part of the representations of the Ministry, as defined in the *Code of Procedure*, and at no point did I depart from the procedures in the *Code* and in *Practice Direction 7* as they relate to the Report.

In summary, I find that the requirements of confidentiality criterion 5(b) have not been established as they relate to the potential application of section 15(b) of the *Act*.

Summary

In summary, for all of the reasons outlined in this interim order and in Interim Order PO-2263-I, I find:

1. No part of the RCMP Report satisfies the requirements of confidentiality criterion 5(b).

2. The model number of the one video cassette recorder referred to in the body of this order will not be disclosed to the appellant at this time.

SUPERINTENDENT DUNN'S SECOND AFFIDAVIT

On February 18, 2004, I received a second affidavit from Superintendent Dunn, elaborating on the information provided in her original affidavit responding to Provisions 3 and 4 of Interim Order PO-2221-I. This second affidavit also includes an Exhibit "A", consisting of audio logs for the Maintenance Shed and video logs for both the Maintenance Shed and the Gatehouse.

For the same reasons as outlined above regarding the RCMP Report and in Interim Order PO-2263-I, I find that no portions of Superintendent Dunn's second affidavit, including the attached Exhibit "A", satisfy the requirements of the confidentiality criteria in section 5 of *Practice Direction 7*.

OUTSTANDING ISSUES RELATING TO THREE SEARCH AFFIDAVITS

In Interim Order PO-2263-I, which dealt with sharing issues relating to the various search affidavits, I identified portions of three search affidavits that contain information that touches on the discrepancy issues relating to Provisions 3 and 4 of Interim Order PO-2221-I. As noted

earlier, I decided at that time to defer my findings as to whether this information should be shared with the appellant, pending my consideration of various other aspects of the discrepancy issues.

For the same reasons as outlined above regarding the RCMP Report and in Interim Order PO-2263-I, I find that the withheld portions of the three search affidavits do not satisfy the requirements of the confidentiality criteria in section 5 of *Practice Direction 7*.

PROCEDURE:

Unless I am served with an application for judicial review, I will provide the appellant with a copy of Superintendent Dunn's February 18, 2004 affidavit, including Exhibit "A", the portions of the three search affidavits of OPP officers withheld in Interim Order PO-2263-I, and the RCMP Report, with the exception of the model number of the video cassette record appearing in four places on two pages of Appendix 8 severed, at **12:00 noon on June 10, 2004**. I have attached a highlighted copy of the two pages of Appendix 8 with the copy of this interim order provided to the Ministry, which identifies the information I will **not** provide to the appellant.

Original signed by: May 27, 2004
Tom Mitchinson
Assistant Commissioner