



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

# **INTERIM ORDER P-724**

**Appeals P\_9200384 and P\_9200413**

**Ministry of Community and Social Services**



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## **NATURE OF THE APPLICATION:**

This is an application for costs made under the Freedom of Information and Protection of Privacy Act (the Act). The requesters originally sought access to records about their stay at the Grandview Training School for Girls (Grandview) from the Ministry of Community and Social Services (the Ministry). The Ministry decided to deny access to these records and the requesters launched separate appeals to the Commissioner's office. These appeals were designated as P\_9200384 and P-9200413, respectively.

In Interim Order P-378, former Assistant Commissioner Tom Mitchinson addressed a number of jurisdictional issues arising in these files. This order is now the subject of an application for judicial review. In addition, the question of whether the appellants will receive access to the records that they seek has yet to be resolved.

The present application was initiated by counsel for the appellants in a letter sent to the Commissioner's office. The gist of the concerns raised is that, although the records responsive to these requests were seized by a police warrant on June 22, 1992, the Ministry did not make the appellants aware of this fact until May 22, 1993. As a result, counsel for the appellants submits that her clients were put to considerable expense in pursuing these appeals which had become moot.

In her letter, counsel asked for the opportunity to make submissions to the Commissioner's office with respect to whether the Ministry should be ordered to compensate her clients for their legal fees for the period from the date of the seizure of the files under warrant until the date on which the Ministry informed her that records relating to her clients were not in the custody or control of the Ministry.

Finally, counsel requested a full inquiry into, and an explanation of, the Ministry's conduct while the appeal process was underway.

In response, the Commissioner's office provided both parties with the opportunity to provide representations concerning these matters. Submissions were received from both parties.

In this order, I will deal only with the issue of whether the Commissioner's office has the jurisdiction to award costs to the appellants. I will address the second matter in a separate communication to the parties should counsel for the appellants wish to pursue this issue following her review of this order. Finally, this order is not intended to comment on any substantive issues which still remain to be resolved in these appeals.

## **THE LEGAL AUTHORITY TO AWARD COSTS**

In her letter, counsel for the appellants submits that, since only an Interim Order has been issued in these appeals, and based on the wording found in section 54(3) of the Act, it is open to the Commissioner's office to make a further order with respect to costs.

In support of this position, counsel has referred me to the U.S. case of R v. Tonkin Ex Parte Federated Ship Painters Union [1954], A.L.R. 777. In that decision, the court stated that:

The expression "terms of an award" means much more than clauses and in fact [it] was conceded it had a wider signification. The expression, in truth, appears to refer to the whole contents of the award as those contents prescribe the rights and obligations of the persons governed by the award or effected by it ...

Counsel for the appellant then goes on to state that:

In an inquiry process, where counsel for the parties makes submissions in good faith over a bona fide dispute of law or fact, it has not been the general policy of the Commission to make an award for costs as part of its order; however, where one party in good faith makes submissions to the Commission, and it has been misled ... on an issue so material that it renders the point in dispute moot, then an award for costs should, if submitted, follow as a term or condition of an order.

In Order P-604, I considered the issue of whether the Commissioner's office has the legal authority to award costs to a party to an appeal. I addressed the issue in the following fashion:

It is a general principle of administrative law that an administrative tribunal possesses only those powers which it has been granted by its enabling statute, by necessary implication or through some statute of general application (see Robert W. Macaulay, Practice and Procedure before Administrative Tribunals (Toronto: Carswell, 1988 at p. 27:10)

I then reviewed the relevant provisions of the Act and concluded that:

... the Act does not expressly provide the Commissioner or his delegate with the authority to award costs to a party in an appeal.

I next considered whether an implied power could be found in the legislation. In this regard, I considered sections 54(1) and (3) of the Act. As well, I referred to section 52(1) of the Act which outlines the scope of the duty of the Commissioner to conduct an inquiry. This section provides that:

Where a settlement is not effected under section 51, the Commissioner shall conduct an inquiry **to review the head's decision.** [emphasis added]

I went on to conclude that:

Based on the wording of [section 52(1)], I believe that any terms or conditions attached to an order must bear directly on the contents of the head's decision or the process by which that decision was issued. In my view, the question of whether costs should be awarded in a proceeding is not directly related to the review of a head's decision. Based on this analysis, I find that the power of the Commissioner to award costs cannot be implied from the provisions of the Act.

I also found that there is no statute of general application, to which the Act is subject, which provides the Commissioner with the power to award costs.

I have considered the submissions put forward by counsel for the appellants in this case. Based on the rationale contained in Order P-604, however, I find that the Commissioner's office does not possess the requisite authority to make an award of costs in these appeals.

Original signed by: \_\_\_\_\_ July 15, 1994  
Irwin Glasberg  
Assistant Commissioner