

COURT OF APPEAL FOR ONTARIO

RE: **IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31**

AND IN THE MATTER OF the *Mental Health Act*, R.S.O. 1990, c. M.7

AND IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

**THE MINISTER OF HEALTH and RONALD G. BALLANTYNE
(Appellants) v.**

**HOLLY BIG CANOE, JOHN/JANE ROE and JOHN DOE
(Respondents)**

BEFORE: **GOODMAN, ROBINS and CATZMAN JJ.A.**

COUNSEL: **Leah Price and Caroline Engmann for the appellants**

**Christopher D. Bredt and David S. Goodis for
the respondent Holly Big Canoe**

Sharon D. Greene for the respondent John/Jane Roe

HEARD: **April 28, 1995**

ENDORSEMENT

[1] It is common ground (1) that the Commissioner is empowered under the *Freedom of Information and Protection of Privacy Act* to entertain the appeal of the requester in this case and commence the inquiry to review the decision of the head of the institution as provided for in s. 52(1) under Part IV of the Act; and (2) that the Commissioner is authorized to determine, as a preliminary issue going to the Commissioner's jurisdiction to continue the inquiry, whether the records sought by the requester fall within the scope of s. 65(2) of the Act. It is also acknowledged that the Commissioner's determination of this preliminary jurisdictional issue is subject to judicial review on a standard of correctness.

[2] The narrow issue in this appeal is whether the Commissioner may invoke the provisions of s. 52(4) of the Act and require the production and examination of the records in question for the purpose of determining whether the Commissioner has jurisdiction to continue the inquiry. The appellants contend that s. 52(4), properly interpreted, is confined to issues which arise in inquiries relating to records referred to under Parts II and III of the Act and that s. 52(4) is not applicable to records referred to under Part V of the Act or, more specifically, to records which may be excluded from the purview of the Act by s. 65(2).

[3] Notwithstanding the very able argument presented by counsel for the appellants, we agree with the conclusion reached by the Divisional Court. It is our opinion also that s. 52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act. Having regard to the purposes of the Act and the manner in which the section is framed, the procedures available to the Commissioner under s. 52 in conducting an inquiry to review a head's decision are applicable to inquiries relating to a head's decision that records sought by a requester are excluded by s. 65(2). We agree also with the Divisional Court that the Commissioner is not precluded by ss. 8 and 35 of the *Mental Health Act* from determining the jurisdictional issue as to whether s.65(2) is applicable by requiring production of the relevant records pursuant to s. 52(4).

[4] The appeal must, accordingly, be dismissed. There will be no costs as between the appellant and the respondent Commissioner. The respondent John/Jane Roe is entitled to his/her costs.

ROBINS J.A.
GOODMAN J.A.
CATZMAN J.A.

May 8, 1995