

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-007

January 21, 2008

CANADIAN SKIN CANCER FOUNDATION

Case File Number P0494

Office URL: <http://www.oipc.ab.ca>

Summary: The patient Complainant went back to see her doctor, Dr. Barry Lycka ("Dr. L."), for treatment of skin cancer at Dr. L.'s physician office clinic ("Clinic"). At the Clinic, the Complainant completed a new Patient History form, where she opted out of the mailing list ("Database"). The Database was updated from information on the Patient History form. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Canadian Skin Cancer Foundation ("Foundation" or "Organization").

Shortly after the Clinic visit, the Complainant began to receive "solicitations" from the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), Corona and the Foundation. The Complainant alleged that the Foundation contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA") by collecting, using and disclosing her personal information for purposes of marketing and soliciting for fundraising. For the first time, the issues of whether a non-profit organization is allowed to collect, use or disclose personal information for purposes of marketing and soliciting for fundraising under PIPA, are considered in an Order.

The Inquiry was held in conjunction with two other inquiries for Case File Numbers H1284 and P0493, which resulted in Order H2007-001 and Order P2007-006 that involve the same Complainant and two other respondents (Dr. L. and Corona), respectively under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") and the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA").

The Organization at this inquiry is involved in three other inquiries for Case File Numbers P0481, P0490 and P0489, which resulted in Orders P2007-008, P2007-009 and P2007-012. One of the other respondents in the concurrent inquiries (Dr. L.) is involved in two other inquiries for Case File Numbers H1325 and H1331, which resulted in Order H2007-003 and Order H2007-004.

The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011. There are a total of nine inquiries pertaining to the Database.

The Adjudicator found that:

- The Foundation is excluded from the application of PIPA pursuant to section 56(2) of PIPA, because the Foundation is a non-profit organization that did not collect, use or disclose the personal information in connection with a commercial activity.
- Due to the above finding, she did not have jurisdiction to decide the Inquiry issues, which were as follows:

ISSUE A: Should neither party have the burden of proof for the definitional issues (personal information, organization, collect, use and disclose)?

ISSUE B: Should the Organization have the burden of proving that any collection, use or disclosure was in accordance with section 7(1) of PIPA? In particular:

- Should the Organization have the burden of proving that any collection, use or disclosure without consent was permitted by section 14, section 17 or section 20 of PIPA?
- Alternatively, if the Organization did not have the authority to collect, use or disclose without consent, should the Organization have the burden of proving that any collection, use or disclosure was permitted with consent in accordance with section 8 of PIPA?

ISSUE C: Should the Organization have the burden of proving that notification was not required, or alternatively, that it provided notification in accordance with section 13 of PIPA?

ISSUE D: Should the Organization have the burden of proving that any collection, use or disclosure was reasonable under section 11(1), section 16(1) and section 19(1) of PIPA?

ISSUE E: Should the Organization have the burden of proving that any collection, use or disclosure was reasonable under section 11(2), section 16(2) and section 19(2) of PIPA?

ISSUE F: Should the Organization have the burden of proving that the personal information was collected directly, or alternatively, that it collected the personal information indirectly in accordance with section 12 of PIPA?

ISSUE G: Did the "Organization" "collect", "use" or "disclose" "personal information", as these terms are defined in PIPA?

ISSUE H: Did the Organization collect, use or disclose the personal information in accordance with section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular:

- Did the Organization have the authority to collect, use or disclose the personal information without consent, as permitted by section 14, section 17 or section 20 of PIPA (authorization for collection, use or disclosure without consent)?
- Alternatively, if the Organization did not have the authority to collect, use or disclose the personal information without consent, did the Organization obtain consent to collect, use or disclose the personal information in accordance with section 8 of PIPA (collection, use or disclosure with consent)?

ISSUE I: Did the Organization collect the personal information in accordance with section 13 of PIPA? In particular, was the Organization required to provide, and if so did it provide, notification in accordance with section 13 of PIPA (notification required for collection)?

ISSUE J: Did the Organization collect, use or disclose the personal information in accordance with sections 11(1), section 16(1) and section 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

ISSUE K: Did the Organization collect, use or disclose the personal information in accordance with sections 11(2), section 16(2) and section 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

ISSUE L: Did the Organization collect the personal information directly from the Complainant (direct collection)?

ISSUE M: If the Organization did not collect the personal information directly from the Complainant, was the collection in accordance with section 12 (limitation on sources for collection)?

Authorities Cited: *Canadian Oxford Dictionary*, 2nd ed., 2004; (Priscilla Platt and Jeffrey Kaufman, *Privacy Law in the Private Sector: An Annotation of the Legislation in Canada* (Aurora, Ontario: Canada Law Book, 2002, pp. PIP-7, 8, 8.1); Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Markham Ontario: Butterworths, 2002; Select Special Personal Information Protection Act Review Committee, *Final Report*, November 2007.

Orders Cited: **AB HIA:** H2007-004, H2007-003, H2007-001; **AB PIPA:** P2007-012, P2007-011, P2007-009, P2007-008, P2007-006, P2006-008; Investigation Report: P2007-IR-001.

Statutes Cited: *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”); *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“PIPA”), ss. 3, 4(1), 4(2), 4(3), 52, 52(3)(e), 52(3)(g), 56(1), 56(1)(b)(i), 56(2), 56(3); *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”), ss. 2.(1), 4.(1)(a).

I. BACKGROUND

[para 1] The patient Complainant went back to see her doctor, Dr. Barry Lycka (“Dr. L.”), for treatment of skin cancer at Dr. L.’s physician office clinic (“Clinic”). At the Clinic, the Complainant completed a new Patient History Form (“Form”), where she opted out of the mailing list (“Database”). The Database was updated from information on the Form. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa

("Corona") and the Canadian Skin Cancer Foundation ("Foundation" or "Organization").

[para 2] Shortly after the Clinic visit, the Complainant began to receive "solicitations" from the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), Corona and the Foundation. The Complainant alleged that the Foundation contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA") by collecting, using and disclosing her personal information for purposes of marketing and soliciting for fundraising.

[para 3] The current complaint was set down for a written inquiry ("Inquiry"). The Information and Privacy Commissioner, Frank Work, Q. C. ("Commissioner") delegated me to hear the Inquiry. At the Inquiry, the parties provided written initial submissions and written rebuttal submissions that were exchanged between the parties. The Complainant requested anonymity, so her name was removed before submissions were exchanged. The Complainant requested that information she previously provided to the Office for purposes of making her complaint, be considered as part of her written initial submission at the Inquiry.

[para 4] The Inquiry was held in conjunction with two other inquiries for Case File Numbers H1284 and P0493, which resulted in Order H2007-001 and Order P2007-006 that involve the same Complainant and two other respondents (Dr. L. and Corona), respectively under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") and PIPA. The parties provided the same written initial submissions and written rebuttal submissions for the three concurrent inquiries.

[para 5] The Organization at this inquiry is involved in three other inquiries for Case File Numbers P0481, P0490 and P0489, which resulted in Orders P2007-008, P2007-009 and P2007-012. One of the other respondents in the concurrent inquiries (Dr. L.) is involved in two other inquiries for Case File Numbers H1325 and H1331, which resulted in Order H2007-003 and Order H2007-004. The respondents provided the same written initial submission for seven of the inquiries.

[para 6] The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011. There are a total of nine inquiries pertaining to the Database.

II. RECORDS/INFORMATION

[para 7] As this is a complaint, there are no records at issue in the usual sense. The Inquiry pertains to the authority of the Foundation to collect, use and disclose personal information for purposes of marketing and soliciting for fundraising. The Foundation says the information in the Database consists of name, telephone number, mailing address, gender and services requested.

III. INQUIRY ISSUES

[para 8] The issues in the Notice of Inquiry are:

ISSUE A: Should neither party have the burden of proof for the definitional issues (personal information, organization, collect, use and disclose)?

ISSUE B: Should the Organization have the burden of proving that any collection, use or disclosure was in accordance with section 7(1) of PIPA? In particular:

- Should the Organization have the burden of proving that any collection, use or disclosure without consent was permitted by section 14, section 17 or section 20 of PIPA?
- Alternatively, if the Organization did not have the authority to collect, use or disclose without consent, should the Organization have the burden of proving that any collection, use or disclosure was permitted with consent in accordance with section 8 of PIPA?

ISSUE C: Should the Organization have the burden of proving that notification was not required, or alternatively, that it provided notification in accordance with section 13 of PIPA?

ISSUE D: Should the Organization have the burden of proving that any collection, use or disclosure was reasonable under section 11(1), section 16(1) and section 19(1) of PIPA?

ISSUE E: Should the Organization have the burden of proving that any collection, use or disclosure was reasonable under section 11(2), section 16(2) and section 19(2) of PIPA?

ISSUE F: Should the Organization have the burden of proving that the personal information was collected directly, or alternatively, that it collected the personal information indirectly in accordance with section 12 of PIPA?

ISSUE G: Did the "Organization" "collect", "use" or "disclose" "personal information", as these terms are defined in PIPA?

[para 9] If I find that the answer to the above question is "yes", I will decide the following issues:

ISSUE H: Did the Organization collect, use or disclose the personal information in accordance with section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular:

- Did the Organization have the authority to collect, use or disclose the personal information without consent, as permitted by section 14, section 17 or section 20 of PIPA (authorization for collection, use or disclosure without consent)?
- Alternatively, if the Organization did not have the authority to collect, use or disclose the personal information without consent, did the Organization obtain consent to collect, use or disclose the personal information in accordance with section 8 of PIPA (collection, use or disclosure with consent)?

ISSUE I: Did the Organization collect the personal information in accordance with section 13 of PIPA? In particular, was the Organization required to provide, and if so did it provide, notification in accordance with section 13 of PIPA (notification required for collection)?

ISSUE J: Did the Organization collect, use or disclose the personal information in accordance with sections 11(1), section 16(1) and section 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

ISSUE K: Did the Organization collect, use or disclose the personal information in accordance with sections 11(2), section 16(2) and section 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

ISSUE L: Did the Organization collect the personal information directly from the Complainant (direct collection)?

ISSUE M: If the Organization did not collect the personal information directly from the Complainant, was the collection in accordance with section 12 (limitation on sources for collection)?

[para 10] The Inquiry pertains only to collection, use and disclosure of personal information for purposes of marketing and soliciting for fundraising. The corollary is that collection, use and disclosure of personal information for other purposes, such as for the provision of health services, is *not* at issue. As the parties submitted the same written initial and written rebuttal submissions for the three concurrent inquiries, the more complete version of the facts, evidence and argument is provided in Order H2007-001. That information will not be repeated in this Order.

IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

The Facts

[para 11] In her written submissions, the Complainant says that in early 2006 she returned to see Dr. L. at the Clinic for a review of her skin cancer progression. She says that she completed the new Form during that physician visit, as the Form had been updated. The Complainant says she opted out of the mailing list on the Form, and

additionally, she verbally told the Clinic reception staff that she did *not* want to be on the mailing list.

[para 12] The Complainant says that within a month after her visit to the Clinic, she began to receive mailings from Dr. L.'s office and over time she also received "solicitations" from Corona and the Foundation. The Complainant says that she telephoned the Clinic about the mailings and reminded the staff about her "opt-out" on the Form. She says the Clinic staff assured her they would update her file and that she would no longer receive the mailings. Nevertheless, the Complainant continued to receive further "solicitations".

[para 13] The Foundation's written submissions describe the development of the Database and the evolution of the relationships among Dr. L., the Clinic, the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), the Foundation, Corona and Endermologie Centre Corporation ("Endermologie").

[para 14] The Foundation says that the Database was established in 2000, but major changes were subsequently made to the Database. In 2004, the new Form was developed, which patients completed when they returned to the Clinic. The Foundation says the Database was updated, which included information from the Form, about 18 months before the complaints arose that gave rise to the Inquiry.

[para 15] The Foundation says the primary purpose of the Database is "keeping track of all the patients seen in the Clinic". The secondary purpose is to "facilitate information distribution" to patients and non-patients. The Foundation says that initially the Database only involved Clinic patients. However, the Database eventually also included non-patients such as Corona clients, Corona seminar attendees and Foundation donors. The Foundation shares the Database with Dr. L. and Corona.

The Evidence

[para 16] When she made her complaint to the Office, the Complainant provided three packages of information, which do not pertain to the Foundation. The relevant tabs provided by the Foundation in its initial written submission are as follows:

- *Tab 2: Alberta Corporation Registration Information (Foundation)* - The Canadian Skin Cancer Foundation was registered as an Alberta Society on October 31, 2003. Dr. Barry Lycka is the President and a Director of the Foundation.
- *Tab 3: Canadian Skin Cancer Foundation Registered Objects (Foundation)* - This Special Resolution created new objects for the Foundation on December 9, 2004, which are to prevent skin cancer by providing public and physician education on early skin cancer detection, awareness and prevention.
- *Tab 4: Question 40, Patient History Form (Dr. L./Clinic)* - This two-page Form is entitled, "Patient History". The top part has blank spaces for first and last name,

age, date of birth, weight, height, present family doctor, doctor's city and telephone number, date of last visit, patient address, occupation, place of employment, patient home phone number, work phone number, e-mail address, next of kin, relationship and next of kin phone number.

- The next part of the Form has blank spaces to answer questions about present general health, visits to the family doctor, allergies, serious illnesses requiring hospitalization and operations. The bottom of the back of the Form has blank spaces for a list of medications and a 'patient' signature. The balance of the Form consists of 40 questions, which are preceded by this statement:

AS PART OF YOUR EVALUATION, PLEASE ANSWER THE FOLLOWING QUESTIONS ABOUT YOUR PAST MEDICAL HISTORY. PLEASE ANSWER BY PLACING A "[CHECK MARK]" IN THE APPROPRIATE BOX.

- The first 39 questions in the Form pertain to an individual's medical condition and state of health. For example the first question is, "Do you have 'low blood' or anemia?" The last of the 40 questions on the Form is:

40. Would you like to be added on too [sic] our mailing list? YES NO

- *Tab 5: Consent Form (Foundation)* - This one-page form is addressed, "Dear Valued Patient". Within the form, Barry S. Lycka, MD, FRCPC, announces the "formation of a new society that I am intimately involved with". The form describes the society as a non profit organization called the Canadian Skin Cancer Foundation.
- *Tab 8: Letters re: Party for Dr. Lycka*
 - *First letter (Dr. L./Professional Corporation)* - This four-page package is almost identical to the March 2006 letter in the Complainant's submission, but this letter is dated April 2006 and the second paragraph reads, "I am writing to you because of your association in one way or another with Dr. Lycka. All of the many patients, colleagues, family members and friends are very aware of the health and cosmetic problems that Dr. Lycka has helped so many people with for over twenty years in Edmonton." The letter is signed by the Controller of the Professional Corporation.
 - *Second letter (Dr. L./Professional Corporation)* - This undated single page letter is addressed by first name, "[D]isappointed and saddened am I". The letter says, "A few weeks ago we sent you an invitation to what will be the social event of 2006. We didn't hear from you so we wrote you again. Still no response. So I'm writing again to make sure you still have a heart beat." This letter is signed by the same individual as the first letter.
 - *Third letter (Foundation)* - This June 2006 single page letter is addressed by first name. The letter refers to the above described undated letter and to Dr. Lycka's birthday party on June 26th and says, "We have received some phone

calls from a few of you that were offended by the content in that letter. Please accept our deepest apologies as we had no intention of offending anyone." This letter is signed by the Office Manager of the Foundation.

The Arguments

[para 17] The Complainant says that the Foundation contravened PIPA when collecting, using and disclosing her personal information for purposes of marketing and soliciting for fundraising. The Complainant takes the position that she opted out of the mailing list and did not consent to her information being collected, used or disclosed for purposes other than the provision of health services.

[para 18] However, the Foundation takes the position that PIPA was not contravened. The Foundation says the Clinic patients with information in the Database consented to collection, use and disclosure of personal information for purposes of marketing and soliciting for fundraising, and therefore, any collection, use or disclosure is authorized under PIPA. In support of its position, the Foundation's written initial submission provided two Investigation Reports issued by this Office.

V. DISCUSSION OF PRELIMINARY ISSUES

Anonymity

[para 19] The usual procedure at an inquiry is that the parties disclose their identities to each other. However, there are exceptions to the general rule. An exception arises when one of the parties has a compelling reason why his or her name should not be disclosed during the process of an inquiry.

[para 20] The Complainant requested anonymity in these proceedings on the basis that she is currently Dr. L.'s patient. In her initial written submission, she says:

I cannot take forward my concern to Dr. Lycka in person as I feel at a disadvantage on several fronts. First, he may again operate on me to remove cancerous tissue and I do not feel I am able to enter into a disagreeable 'meeting of the minds' about this issue. Consider my position - would you want to go under the knife of someone you had a disagreement with?! My health is literally, in his hands.

[para 21] Dr. L.'s response is as follows:

While we understand the perception the patient may have that should she complain about being on the mailing list, her health care may be in jeopardy, Dr. Lycka emphatically denies such is the case.

[para 22] I accept the argument that it is the Complainant's perception that disclosing her identity to Dr. L. in these proceedings could "disadvantage" her in terms of obtaining health services. I accept the Complainant's concern that disclosing her

identity in these proceedings could negatively affect her ongoing relationship with Dr. L. and access to medical treatment. In the Complainant's own words, "My health is literally, in his hands." I take the same approach to this issue as in Orders H2007-001 and P2007-006, which pertain to the same Complainant. In my view, the Complainant has provided a compelling reason for anonymity in these proceedings.

Non-inquiry issue

[para 23] The second letter under Tab 8 in Dr. L.'s initial submission is the letter that begins, "[D]isappointed and saddened am I". The letter says, "A few weeks ago we sent you an invitation to what will be the social event of 2006. We didn't hear from you so we wrote you again. Still no response. So I'm writing again to make sure you still have a heart beat."

[para 24] The Foundation raises the following issue:

The Complainants found the content of the letter to be insulting and in poor taste. That is not relevant to this inquiry. ... Just because a few of the recipients did not like, or were offended by the content of the letter does not mean there was a breach of either act.

[para 25] The Complainant responds, as follows:

I have not submitted a complaint to OIPC simply because I did not like or was offended by the content of the fundraising letter[s].

[para 26] I accept the argument of the parties that whether the letter(s) are "insulting and in poor taste" is not relevant to the PIPA issues before the Inquiry. My jurisdiction at the Inquiry and the scope of this Order are restricted to the collection, use and disclosure issues under PIPA. Section 52 requires me to issue an Order that relates to the Inquiry issues, such as requiring an organization to stop collecting, using or disclosing personal information in contravention of PIPA (section 52(3)(e) and requiring an organization to destroy personal information collected in contravention of PIPA (section 52(3)(g)).

Commercial activity

[para 27] I must first determine whether I have jurisdiction to consider the Inquiry issues before me. I must consider this jurisdictional issue at the outset of the Inquiry because I must have jurisdiction in order to have the authority to consider and decide the substantive Inquiry issues. If I find that I do not have jurisdiction that means that I also do not have authority to decide the Inquiry issues.

[para 28] The Complainant says the Foundation collected, used and disclosed her personal information in contravention of PIPA. However, the Foundation says it is a non-profit charitable organization that is a separate entity from the Clinic, the

Professional Corporation and Corona. The Foundation says it was registered as a non-profit society in 2003. The Corporate Search under Tab 2 of the Foundation's initial submission shows that the Foundation was registered as an Alberta Society on October 31, 2003.

[para 29] The relevant parts of section 56 of PIPA, under Part 6 (Professional Regulatory and Non-Profit Organizations), read:

56(1) In this section,

(a) "commercial activity" means

(i) any transaction, act or conduct, or

(ii) any regular course of conduct,

that is of a commercial character and, without restricting the generality of the foregoing, includes the following:

(iii) the selling, bartering or leasing of membership lists or of donor or other fund-raising lists;

(b) "non-profit organization" means an organization

(i) that is incorporated under the *Societies Act* or the *Agricultural Societies Act* or that is registered under Part 9 of the *Companies Act*.

56(2) Subject to subsection (3), this Act does not apply to a non-profit organization or any personal information that is in the custody of or under the control of a non-profit organization.

56(3) This Act applies to a non-profit organization in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.

[para 30] The general rule is that PIPA does not apply to non-profit organizations. Pursuant to section 56(2), PIPA does *not* apply to non-profit organizations or to the personal information that is in the custody or under the control of non-profit organizations. The Foundation is a non-profit organization that is incorporated under the *Societies Act* that falls under section 56(1)(b)(i) of PIPA. Therefore in my view, as a general rule, PIPA does not apply to the Foundation by virtue of section 56(2) of PIPA.

[para 31] The exception to the general rule is that PIPA does apply to non-profit organizations where there is any commercial activity. Pursuant to section 56(3), PIPA *does* apply to non-profit organizations and to the personal information that is in the custody or under the control of non-profit organizations when the information is collected, used or disclosed in connection with "any commercial activity".

[para 32] Therefore, I must consider whether, in the circumstances of this case, the Foundation collected, used or disclosed the Complainant's personal information in

connection with “any commercial activity”. I will begin by considering the meaning of the words, “commercial activity”, in section 56 of PIPA. Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham Ontario: Butterworths, 2002) describes the modern principle of statutory interpretation, as follows:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (page 1).

[para 33] The objects and general purpose of PIPA are set out in section 3 of Part 1 (Purpose and Application), as follows:

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

[para 34] Section 4 indicates that PIPA is intended to have a broad application to organizations and to personal information, as follows:

4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.

[para 35] However, there are clear limits to the application of PIPA. For example, section 4(2) and section 4(3) set out a number of exclusions where PIPA does not apply. Similarly, section 56(2) of PIPA sets out the general rule for non-profit organizations, which is that PIPA does not apply. The exception to the general rule for non-profit organizations is that PIPA applies where the non-profit organization collects, uses or discloses personal information in connection with a “commercial activity” (section 56(3)).

[para 36] Section 56(1)(a) of PIPA defines “commercial activity” to mean any transaction, act or conduct, or any regular course of conduct, that is of a commercial character and that includes the selling, bartering or leasing of membership lists or of donor or other fund-raising lists. Therefore, “commercial activity” can be either a single transaction or act or conduct or a course of conduct that is of a commercial character. Selling, bartering or leasing of membership lists or of donor or other fund-raising lists are examples of a course of conduct that is of a commercial character.

[para 37] The *Canadian Oxford Dictionary*, 2nd ed., 2004, defines “commercial” and “activity,” as follows:

Commercial – Having profit as a primary aim rather than artistic etc. (p. 307); Activity – Particular occupation or pursuit (p. 13).

[para 38] The term, “commercial activity” is also used in section 4.(1)(a) of the federal private sector legislation, the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”), as PIPEDA applies to personal information

that an organization collects, uses or discloses in the course of commercial activities. Section 2.(1) of PIPEDA defines “commercial activity” in an almost identical manner to the above part of the definition in section 56(1)(a) of PIPA.

[para 39] The following comments have been made about “commercial activity” for the parallel provision under section 4.(1)(a) of PIPEDA:

“Commercial activity” is a vague phrase that potentially can be defined in a number of ways. The first point to note about the definition is that it has what might be termed a “transaction-based” component. That is to say, the definition applies not only to a “regular course of conduct” that is of a commercial character, but also to “any particular transaction, act or conduct” (*emphasis added*) that has a commercial character. The reference to a “regular course of conduct” would likely include that regular activities of businesses and other commercial entities. However, the fact that particular transactions are also caught by this definition implies that single or isolated activities of non-commercial entities are also covered by the definition, if they have a commercial character. In other words, non-profit or charitable organizations that engage in limited commercial activities that are ancillary to their primary functions would nevertheless be subject to the Act to the extent that those commercial transactions involve the collection, use or disclosure of personal information. ...

The next element of the definition that should be noted is the phrase “conduct that is of a commercial character”. Although this phrase is not defined, the definition of “commercial activity” itself provides an example of what might constitute such conduct. It states that conduct that is of a commercial character includes “the selling, bartering or leasing of donor, membership or other fundraising lists.” This example, reinforces the transaction-based nature of the definition. Presumably, donor lists would be sold or bartered by non-profit organizations, which are organizations that one might normally consider not to be engaged in commercial activities. Nevertheless, if a non-profit organization engages in a transaction that has a commercial character, such as the sale of a fundraising list, this transaction would be subject to PIPEDA. It should be noted that the legislation stipulates, by using the word “including”, that this is simply one example. Accordingly, other actions of a similar character would also be covered. Finally, the reference to “bartering” is interesting, as it broadens the scope of the phrase “commercial character”. ...

The phrase, “commercial activity” has been considered in the case law in a variety of statutory contexts. Courts have commented on the difficulty of assigning a precise meaning to this phrase, often citing lengthy and varied definitions from dictionaries. ... These cases indicate that, in its ordinary meaning, “commercial activities” refer to purposes related to trade and the buying and selling of commodities. In *Windsor-Essex County Real Estate Board v. Windsor (City)*, the Ontario Court of Appeal indicated that a commercial activity usually implies an activity undertaken with the intention of making a profit, but suggests that this is not necessarily the only way of defining such an activity:

There is no doubt that an intention to make a profit will be a very important factor in determining whether an activity is a commercial activity but the lack of it does not automatically prevent it from being so characterized.

Significantly, the Court of Appeal did not go on to explain exactly how one determines whether an activity is properly characterized as a commercial activity. ...Although these

cases may be of some general interest in outlining the potential scope of the phrase “commercial activity”, they provide little direct guidance in interpreting the phrase for the purposes of PIPEDA. The theme that emerges from these cases is that the phrase is capable of a broad range of meanings that may vary from one statute to another, and that it is necessary to consider the phrase in the overall statutory context and in light of the purpose of the statute in which the phrase is found (Priscilla Platt and Jeffrey Kaufman, *Privacy Law in the Private Sector: An Annotation of the Legislation in Canada* (Aurora, Ontario: Canada Law Book, 2002, pp. PIP-7, 8, 8.1).

[para 40] This means that whether PIPA applies to a non-profit organization is a question that must be considered in the circumstances of every case and determined on a case-by-case basis. The Complainant says that she did not give permission for Dr. L. or the Foundation to “collect, share, lease, rent, distribute or otherwise utilize” her personal information. The Complainant also refers to her personal information as being “shared and/or sold or leased”. However, the Complainant did not specifically address section 56 of PIPA and did not provide any evidence to show that the Foundation is engaged in any commercial activity with respect to her personal information.

[para 41] On the other hand, the Foundation has provided evidence of its non-profit status, in that it is registered under the *Societies Act* in Alberta. The only evidence I have before me shows that the soliciting for fundraising that related to the Foundation was an activity that was conducted solely for the purpose of fund-raising for charitable purposes, rather than to raise funds for regular operations or for other non-charitable purposes.

[para 42] Furthermore, it was Dr. L. through the Professional Corporation and not the Foundation, which sent the letters that were solicitations for fundraising. The only letter that is signed by an individual at the Foundation is the letter of June 2006, which was a letter of apology for the previous letter. The facts of this case lead to a different conclusion than the findings issued by the Office in Order P2006-008 and Investigation Report P2007-IR-001, where the personal information collected, used or disclosed by non-profit organizations was connected with a commercial activity.

[para 43] In my view in the circumstances of this case, the Foundation was a non-profit organization, which was not involved in a commercial activity, as defined in PIPA. In this particular situation, the Foundation was not involved in any transaction, act or conduct, or in any regular course of conduct that is of a commercial character and was not involved in the selling, bartering or leasing of membership lists or of donor or other fund-raising lists, pursuant to section 56(1) and section 56(3) of PIPA.

[para 44] For all of the above reasons, I find that in this case, section 56(2) of PIPA applies to the Foundation. This means that the Foundation is excluded from the application of PIPA because it is a non-profit organization that did not collect, use or disclose the Complainant’s personal information in connection with a commercial activity.

VI. DISCUSSION OF INQUIRY ISSUES

[para 45] Due to my finding that PIPA does not apply to the Foundation, I do not have jurisdiction over the Foundation or over the personal information that is in the custody or under the control of the Foundation. Therefore, it follows that I also do not have the authority to decide any of the above Inquiry issues.

[para 46] I note that the situation may be different under PIPA in the future due to Recommendation 5 of the Select Special Personal Information Protection Act Review Committee, *Final Report* (November 2007), which recommended fully including non-profit organizations under PIPA.

VII. ORDER

[para 47] I make the following Order under section 52 of PIPA:

- I find that:
 - The Foundation is excluded from the application of PIPA under section 56(2) of PIPA, as it is a non-profit organization that did not collect, use or disclose the Complainant's personal information in connection with a commercial activity; and
 - Given the above finding, I do not have authority to decide any further issues at the Inquiry.

Noela Inions, Q. C.
Adjudicator