

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER P2007-008

January 22, 2008

#### CANADIAN SKIN CANCER FOUNDATION

Case File Number P0481

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

**Summary:** The Complainant received medical treatment several years ago from her doctor, Dr. Barry Lycka ("Dr. L."), at a physician office clinic ("Clinic"). In 2006, the Complainant received four letters soliciting for fundraising from Dr. L., through the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), on behalf of the Canadian Skin Cancer Foundation ("Foundation" or "Organization").

The complaint pertains to only one of the four letters, which the Complainant describes as being "offensive and very irritating" as well as "intimidating and aggressive". An excerpt from the letter that is the subject of the complaint, 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 am writing again to make sure you still have a heartbeat."

Dr. L. created a mailing list ("Database") that includes the individuals who were patients at the Clinic. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The issues of whether Dr. L. contravened the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") by collecting, using and disclosing the Complainant's health information for purposes of soliciting for fundraising were set down for a written inquiry ("Inquiry").

The Inquiry was held in conjunction with an inquiry for Case File Number H1325, which resulted in Order H2007-003 and involves the same Complainant and Dr. L. under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA"). Dr. L. is involved in two other inquiries for Case File Numbers H1284 and H1331, which resulted in Order H2007-001 and Order H2007-004. The Foundation is

involved in three other inquiries for Case File Numbers P0494, P0490 and P0489, which resulted in Orders P2007-007, P2007-009 and P2007-012.

The Endermologie Centre Corporation (trade name is Corona) is involved in an inquiry under Case File Number P0493, which resulted in Order P2007-006. 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 complaint is excluded from the application of PIPA, as the complaint does not pertain to the collection, use or disclosure of the Complainant's personal information under PIPA;
- 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 in this case; and
- Due to the above findings, there was no jurisdiction to decide any of the Inquiry issues.

**Orders Cited:** AB HIA: H2007-004, H2007-003, H2007-001; AB PIPA: P2007-012, P2007-011, P2007-009, P2007-007, P2007-006.

**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. 52, 56(1), 56(1)(a), 56(1)(b), 56(1)(b)(i), 56(2), 56(3).

## I. BACKGROUND

[para 1] The Complainant received medical treatment several years ago from her doctor, Dr. Barry Lycka ("Dr. L."), at a physician office clinic ("Clinic"). In 2006, the Complainant received four letters soliciting for fundraising from Dr. L., through the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), for the Canadian Skin Cancer Foundation ("Foundation" or "Organization").

[para 2] The complaint pertains to only one of the four letters, which the Complainant describes as being "offensive and very irritating" as well as "intimidating and aggressive". An excerpt from the letter that is the subject of the complaint, 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 am writing again to make sure you still have a heartbeat."

[para 3] Dr. L. created a mailing list ("Database") that includes the individuals who were patients at the Clinic. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The issues of whether the Foundation contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA") by collecting, using and disclosing the Complainant's personal information for purposes of soliciting for fundraising were set down for a written inquiry ("Inquiry").

[para 4] 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 that were exchanged between the parties. The Complainant requested anonymity, so her name was removed before submissions were exchanged. The Inquiry was held in conjunction with an inquiry for Case File Number H1325, which resulted in Order H2007-003 and involves the same Complainant and Dr. L. under the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”).

[para 5] Dr. L. is involved in two other inquiries for Case File Numbers H1284 and H1331, which resulted in Order H2007-001 and Order H2007-004. The Foundation is involved in three other inquiries for Case File Numbers P0494, P0490 and P0489, which resulted in Orders P2007-007, P2007-009 and P2007-012. The Endermologie Centre Corporation (trade name is Corona) is involved in an inquiry under Case File Number P0493, which resulted in Order P2007-006. The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011.

[para 6] The respondents provided the same written initial submission for seven of the inquiries. 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.

[para 11] As the respondents submitted the same written initial submissions for seven of the inquiries, the more complete version of the facts, evidence and argument for the Foundation is provided in Order H2007-001. As the Complainant provided the same initial written submission for the two concurrent inquiries, the more complete version of the Complainant's facts, evidence and argument is provided in Order H2007-003. That information will not be repeated in this Order.

#### IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

##### *The complainant*

[para 12] In her initial written submission, the Complainant describes the focus of her complaint, as follows:

I believe the writer of the letter showed very poor taste in soliciting in this manner but also, it was disturbing for a medical office to make light of the dead or dying by saying "*to make sure you still have a heart beat*".

[para 13] The Complainant provided a copy of the complaint she made to the Commissioner's Office in her initial written submission, which is as follows:

I wish to register a complaint regarding the attached letter that was the third of three letters sent to my home from the staff at Dr. Lycka's office. I did not save the first two letters which I remember indicating something like since I was a prior patient of Dr. Lycka's I would certainly like to attend and support his 50<sup>th</sup> birthday party. I believe they indicated that the amount that was expected from me was somewhere around \$100. I remember thinking that these requests were inappropriate but felt that ignoring the letters would make the point that I was not interested. ...

I was prepared to ignore the requests for funding but the third letter (attached) caused me great concern. It appeared to be intimidating and aggressive: *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 am writing again to make sure you still have a heartbeat. I found this offensive and very irritating.*

[para 14] In her initial written submission, the Complainant attached a copy of the letter she was complaining about, which reads:

***Disappointed  
and  
saddened  
am  
I...***

Dear <first name>

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.

The event is **THE SPRING GALA** for the **Canadian Skin Cancer Foundation**. There will be draws for **A TRIP TO LAS VEGAS** (and you have a chance of at least 1/500 of winning). **A BIG SCREEN TELEVISION** (again a 1/500 CHANCE - wouldn't it have been nice to watch the "Oil" win the Stanley cup on your own home entertainment center?), door prizes and gift certificates for Corona Rejuvenation Center and Spa.

Remember, we have a great lineup of entertainment for you ...

The best part of the evening will be the special tribute to Dr. Lycka in celebration of his 50<sup>th</sup> birthday. This of course, is our '**TOP SECRET' Operation Old Buzzard** surprise part of the program, and one that we don't want you to miss. (Please don't tell the old buzzard - it's a surprise!)

Please help us reach our goal of 1000 tickets so that we can present Dr. Lycka with the greatest gift of all - a nice big cheque for the **CSCF**! There is nothing that would please him more.

We know how many people he has helped over the last twenty years or so - tens of thousands to be exact - and how passionate he is about the cause. Instead of just being able to help people with their skin problems and cancers, we want to help to fulfill his dream of detection and prevention of skin cancer through awareness and education.

**THE ONLY WAY WE CAN DO THIS IS TO RAISE THE MUCH NEEDED FUNDS!!!**

Please show your support and call us **TODAY** at (780) 423-CSCF (2723) to order your tickets.

[first and last name of individual who is Controller of the Professional Corporation]

## *The Foundation*

[para 15] The Foundation's written initial submission describes the development of the Database and the evolution of the relationships among Dr. L., the Clinic, the Professional Corporation, Corona, Endermologie Centre Corporation ("Endermologie") and the Foundation. The Foundation says that the Database was established in 2000, but "major changes" were subsequently made. The Foundation says that the Database was updated, which included information from a new Patient History Form, about 18 months before the complaints arose that gave rise to the Inquiry.

[para 16] The Foundation says that 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 to begin with the Database only included Clinic patients, but over time the Database expanded to include non-patients such as Corona clients, Corona seminar attendees, Foundation donors and other individuals. The Foundation shares the Database with Corona and Dr. L.

[para 17] The Foundation says that approximately 59,000 letters were sent out in four mailings, as follows:

- April 10, 2006 - 14,992 letters sent;
- May 23, 2006 - 14,836 letters sent;
- June 12, 2006 - 14,716 letters sent; and
- June 19, 2006 - 14,635 letters sent.

[para 18] The Foundation's initial written submission says:

The first letters used humour to get the attention of the recipients. There was some feedback that some individuals were offended by some of the content of the letter, and therefore the last letter contained an apology.

[para 19] The Foundation's initial written submission contains ten tabs and a "Table of Authorities". The tabs that pertain to the Inquiry 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 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 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 26<sup>th</sup> 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.

[para 20] The Foundation takes the position that PIPA was not contravened in the mailings. The Foundation says that the Clinic patients with information in the Database consented to the collection, use and disclosure of personal information for purposes of soliciting for fundraising, and therefore, any collection, use or disclosure is authorized under PIPA. In support of this position, the Foundation provided two Investigation Reports issued by the Office.

## V. DISCUSSION OF PRELIMINARY ISSUES

### *Anonymity*

[para 21] 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. The Complainant requested anonymity in these proceedings on the basis that she is currently Dr. L.’s patient.



[para 22] I take the same approach to this issue as in Orders H2007-001, H2007-004, P2007-006, P2007-007 and P2007-009 as well as in Order H2007-003, which pertains to the same Complainant. I accept that it is the Complainant's perception that disclosing her identity to Dr. L. in these proceedings could compromise her in terms of obtaining health services. In my view, the Complainant has provided a sufficient reason for anonymity in these proceedings.

### *Non-inquiry issue*

[para 23] The letter that the Complainant provided as the subject of her complaint that she refers to as the third letter (this is the same letter that is described as the second letter under Tab 8 in the initial submission of the Foundation) begins, "[D]isappointed and saddened am I" ... 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 Complainant says:

I wish to register a complaint regarding the attached letter that was the third of the three letters sent to my home from the staff at Dr. Lycka's office. ... I was prepared to ignore the requests for funding but the third letter (attached) caused me great concern. It appeared to be intimidating and aggressive: *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 am writing again to make sure you still have a heartbeat.* I found this offensive and very irritating.

[para 25] The Foundation's initial written submission says:

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 26] The Complainant describes the above letter, which is the sole focus of the complaint before me, as being "intimidating and aggressive" and as "offensive and very irritating". These are not matters that relate to the Inquiry issues or that fall within the scope of PIPA. I do not have the authority at the Inquiry to consider matters that fall outside of the complaint that was made by the Complainant or that fall outside of PIPA.

[para 27] I accept the Foundation's submission that whether this letter is "insulting and in poor taste" is not relevant to the Inquiry. This Order takes the same approach as Orders H2007-001, H2007-004, P2007-006, P2007-007, P2007-009, P2007-011 and P2007-012, as well as in Order H2007-003, which pertains to the same Complainant. I said that whether the letters were "insulting and in poor taste" was not relevant to the issues that were before me at the Inquiry.

[para 28] However in contrast to the other fact situations, but similar to Order H2007-003, the entirety of the complaint made by the Complainant relates to non-inquiry issues.

[para 29] Furthermore, the letter that is the subject of the complaint was not sent from the Foundation, but rather from Dr. L., through the Controller of the Professional Corporation. The Complainant provided a copy of the letter that was sent to her from the Professional Corporation, but not a letter sent to her from the Foundation. The Complainant did not make a complaint about the Foundation, make any allegations whatsoever that pertain to the Foundation or provide any evidence to show that the Foundation contravened PIPA.

[para 30] My jurisdiction at the Inquiry and the scope of this Order are restricted to the collection, use and disclosure issues at the Inquiry, as those issues pertain to the Foundation under PIPA. Section 52 allows me to issue an Order that relates to the Organization and the Inquiry issues, such as requiring an organization to stop collecting, using or disclosing personal information in contravention of PIPA (section 52(3)(e)), or requiring an organization to destroy personal information collected in contravention of PIPA (section 52(3)(g)).

### *Commercial activity*

[para 31] Despite my finding at paragraph 29, I will consider whether the Foundation is subject to PIPA. The Complainant did not address whether the Foundation collected, used or disclosed her personal information in contravention of PIPA. The Complainant did not address whether the Foundation is a non-profit organization under PIPA or whether the Foundation was involved in any commercial activity with regard to her personal information.

[para 32] The Foundation says that 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 33] 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 34] 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. I accept the submission of the Foundation that it is a non-profit organization that was incorporated under the *Societies Act*. In my view, this means that the Foundation falls under section 56(1)(b)(i) of PIPA, and as a general rule, PIPA does not apply to the Foundation by virtue of section 56(2) of PIPA.

[para 35] 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 36] I take the same approach to the interpretation of “commercial activity” for a non-profit organization under PIPA, as I did in Orders P2007-007, P2007-009 and P2007-012. This means that whether PIPA applies to a non-profit organization is a question that must be considered in the particular circumstances and determined on a case-by-case basis. The Complainant did not specifically address section 56 of PIPA or provide any evidence to show that the Foundation is engaged in any commercial activity with respect to her personal information.

[para 37] 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 38] In my view in the circumstances of this case, the Foundation was acting as a non-profit organization and was not involved in any commercial activity, as defined in PIPA. In this particular situation, I find that 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 39] For all of the above reasons, I find that section 56(2) of PIPA applies to the Foundation. This means that in this case 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 any commercial activity.

[para 40] 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 from the Professional Corporation.

## **VI. DISCUSSION OF INQUIRY ISSUES**

[para 41] Due to my findings that the Complainant's complaint does not pertain to collection, use or disclosure of her personal information under PIPA, and additionally, that PIPA does not apply to the Foundation in this case, this means that 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.

## **VII. ORDER**

[para 42] I make the following Order under section 52 of PIPA:

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

Noela Inions, Q. C.  
Adjudicator