

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-011

January 29, 2008

BARRY LYCKA PROFESSIONAL CORPORATION

Case File Number P0482

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

Summary: In 1999, the Complainant made an inquiry about a cosmetic procedure to Dr. Barry Lycka ("Dr. L."), at his physician office clinic ("Clinic"). In 2006, the Complainant received mailings pertaining to soliciting for fundraising from the Barry Lycka Professional Corporation ("Professional Corporation" or "Organization"), on behalf of the Canadian Skin Cancer Foundation ("Foundation").

In 2000, Dr. L. created a mailing list ("Database") that includes individuals who make inquiries at the Clinic. Dr. L. now shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The Complainant said that the Professional Corporation 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 soliciting for fundraising.

For the first time, the issue of personal information that was collected for purposes of soliciting for fundraising before PIPA came into force, under the grandfathering provision in section 4(4), is considered in an Order. The matter was set down for a written inquiry ("Inquiry"). The Inquiry was held in conjunction with an inquiry for Case File Number P0489, which resulted in Order P2007-012 and involves the same Complainant and the Foundation.

The Foundation is involved in three other inquiries for Case File Numbers P0494, P0481 and P0490, which resulted in Orders P2007-007, P2007-008 and P2007-009. Dr. L. is involved in three inquiries for Case File Numbers H1284, H1325 and H1331, which resulted in Orders H2007-001, H2007-003 and H2007-004. The Endermologie Centre Corporation (trade name is Corona) is

involved in an inquiry under Case File Number P0493, which resulted in Order P2007-006. There are a total of nine inquiries pertaining to the Database.

The Adjudicator found that the Organization collected, used and disclosed the Complainant's personal information in accordance with PIPA, pursuant to the grandfathering provision in section 4(4) of PIPA. She did not find it necessary to decide the balance of the Inquiry issues.

Orders Cited: AB HIA: H2007-004, H2007-003, H2007-001; AB PIPA: P2007-012, P2007-009, P2007-008, P2007-007 and P2007-006.

Statutes Cited: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(d) and 1(1)(w); *Personal Health Information Protection Act, 2004*, S.O 2004, c. 3, Schedule A, s. 2; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(i), 1(i)(i), 1(k), 4, 4(4), 4(4)(a), 4(4)(b), 4(4)(c), 7(1), 8, 11(1), 11(2), 12, 13, 14, 16(1), 16(2), 17, 19(1), 19(2), 20, 21 and 52.

I. BACKGROUND

[para 1] In 1999, the Complainant made an inquiry about a cosmetic procedure to Dr. Barry Lycka ("Dr. L."), at his physician office clinic ("Clinic"). In 2006, the Complainant received mailings pertaining to soliciting for fundraising from the Barry Lycka Professional Corporation ("Professional Corporation" or "Organization"), on behalf of the Canadian Skin Cancer Foundation ("Foundation").

[para 2] In 2000, Dr. L. created a mailing list ("Database") that includes individuals who make inquiries at the Clinic. Dr. L. now shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The Complainant said that the Professional Corporation 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 soliciting for fundraising.

[para 3] The matter 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, both of the parties provided written initial submissions and the Complainant provided a written rebuttal submission, which was exchanged between the parties. The parties provided the same written submissions for both of the concurrent inquiries.

[para 4] The Inquiry was held in conjunction with an inquiry for Case File Number P0489, which resulted in Order P2007-012 and involves the same Complainant and the Foundation. The Foundation is involved in three other inquiries for Case File Numbers P0494, P0481 and P0490, which resulted in Orders P2007-007, P2007-008 and P2007-009. Dr. L. is involved in three inquiries for Case File Numbers H1284, H1325 and H1331, which resulted in Orders H2007-001, H2007-003 and H2007-004.

[para 5] The Endermologie Centre Corporation (trade name is Corona) is involved in an inquiry under Case File Number P0493, which resulted in Order P2007-006. There are a total of nine inquiries pertaining to the Database.

II. RECORDS/INFORMATION

[para 6] As this is a complaint, there are no records at issue in the usual sense. The Inquiry pertains to the authority of the Professional Corporation to collect, use and disclose personal information for purposes of soliciting for fundraising. The Professional Corporation says the information in the Database consists of name, telephone number, mailing address, gender and services requested.

III. INQUIRY ISSUES

[para 7] 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 8] 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 (indirect collection without consent)?

IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

The Complainant

[para 9] The Complainant provided the same written initial and written rebuttal submissions for the two concurrent inquiries. The more complete version of the Complainant’s facts, evidence and argument is provided in this Order.

[para 10] Excerpts from the Complainant’s summary of the facts are as follows:

June 14th 2006

I wrote a letter to the Commissioner of Privacy and Information and to the College of Physicians of Alberta regarding a concern that my rights under the Freedom of Information and Protection of Privacy Act were being violated. (Document #1)

Unsure of date received, but letter was dated June 14th, 2006

I received a letter from the office of the physician stating an apology for the offensive letter. (Document #2)

June 19th, 2006

I received a letter from the physician stating that he appreciated receiving my comments regarding the offensive letter. (Document #3)

November 24th, 2006

I received a letter from the College of Physicians & Surgeons of Alberta regarding the Investigation Process. It appears I have been on the database of the physician since 1999 when I made an inquiry about a procedure. The findings of this report [file number] indicate the following:

1. The physician recognizes that privacy of patients it [sic] to be respected.
2. Patients should not receive unsolicited material without permission from the patient.
3. My name has been removed from the database. (Documentation #5 – this document is confidential)

[para 11] In her written initial submission, the Complainant provided five letters that she labeled as “Documents”. Document #1 is the following letter of complaint that the Complainant sent to the Commissioner’s Office, which is dated June 14, 2006:

I am writing this letter to express my disappointment and concern regarding the unsolicited correspondence I am receiving from the office of Dr. Barry Lycka.

From previous correspondence I have received, it appears as though the office of Dr. Barry Lycka is using the personal information from patient records to solicit funds for a gala sponsored by his office. I have never been a patient of Dr. Lycka’s office and so I find this an intrusion of my privacy that I am receiving so much inappropriate correspondence from this office.

As a health care professional I am disappointed that the Freedom of Information and Protection of Privacy Act is being abused by the office of Dr. Barry Lycka.

[para 12] The Complainant provided attachments to Document #1 that consist of a letter and an envelope. The envelope contains the Complainant’s first name, last name and mailing address. The letter that the Complainant received on June 13, 2006 reads, “Disappointed and saddened am I”, and, “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 13] Document #2 is a letter dated June 14, 2006 that is addressed to the Complainant by first and last name at her mailing address. This letter contains the signature and typewritten name and title of the Office Manager of the Foundation as

well as the typewritten name of Dr. Barry Lycka, FRCP of the Canadian Skin Cancer Foundation. This letter refers to the above described undated letter 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. ... Again, please accept our apologies and please reconsider the invitation to join us if you have not already purchased your tickets.

[para 14] Document #3 is a letter dated June 19, 2006 that is addressed to the Complainant by first and last name at her mailing address. This letter contains the signature and typewritten name of Barry S. Lycka, MD, FRCPC, on the letterhead that says, "Dr. Barry A. S. Lycka, M.D. FRCPC, Diplomate, American Board of Dermatology. The letter says:

Thank you very much for taking the time to write a letter to us. We appreciate receiving your comments and will ensure that the content of our letters will not be misinterpreted in the future. I agree with you and I understand how you were hurt by the letter that was sent out.

[para 15] In her written initial submission, the Complainant said:

I believe the organization did use my personal information. I understand that my name was part of the database of the physician due to inquiry [sic] I made in 1999. I do not recall being a patient in the office. I believe personal information is to be kept to call patients for appointments, etc. It is not to be meant for solicitation. It should be noted that the physician did send me a letter of apology regarding the letter. The College of Physicians of Alberta also made an inquiry into the matter and the physician has now removed my name from his database and has stated that patients will only receive solicited material with informed consent.

[para 16] In her written rebuttal submission, the Complainant said:

According to an investigation completed on November 24, 2006 by the College of Physicians and Surgeons of Alberta, it appears that I have "been a member of [Dr. Lycka's] database since 1999 at which time[I] requested information from his office about a particular cosmetic procedure. [My] name was subsequently added to the database for newsletters." I imagine this is how Dr. Lycka or the Foundation obtained my mailing information. I did not know this when I wrote the letter.

The reason why I wrote to the Office of the Information and Privacy Commission [sic] and to the College of Physicians and Surgeons of Alberta was because of the letter entitled "disappointed and saddened am I. ..." I wrote because of the statement "So I'm writing again to make sure you still have a heart beat". This statement is not humour. This is a mean spirited statement.

The Professional Corporation

[para 17] The more complete version of the substance of the facts, evidence and argument pertaining to the Database that was provided by the respondents, including

the Professional Corporation is set out in Order H2007-001. The more complete version of argument pertaining to the application of PIPA to the Database that was provided by the respondents, including the Professional Corporation, is set out in Order P2007-006. Information already set out previously will not be repeated in this Order.

[para 18] The submission provided by the Professional Corporation in the two concurrent inquiries is almost identical to the submission provided by the respondents in the previous seven inquiries, minus some references to the *Health Information Act* (“HIA”) and Corona. The Professional Corporation 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.

[para 19] The Professional Corporation describes the relationship with the Foundation before the Foundation became a separate legal entity, as follows:

The Foundation was first registered as an active non-profit society in 2003, but fund raising efforts had been initiated prior to that time. These efforts were coordinated by Dr. Lycka personally.

The Canadian Skin Cancer Foundation (the “Foundation”) is a nonprofit charitable organization with its own Board of Directors and operates separately from the Clinic, the Professional Corporation and Corona.

Many of the patients who attended the Clinic, as well as other members of the public who utilized the services provided by Dr. Lycka and the Foundation have expressed an interest in donating money to skin cancer awareness and education.

Dr. Lycka’s Professional Corporation and the Foundation are related but separate organizations. Many of the patients of the Clinic are also involved with the Foundation, but each entity has their own method of obtaining consent from the patients/clients to include their names on the mailing list.

[para 20] The Professional Corporation describes the Database as follows:

In 2000 because of the large number of patients who had been seen in the Clinic over the years, and because of the repeated requests for information and seminars, the Clinic established a database with the names, phone numbers and addresses of all the patients who had recently attended the Clinic.

The database was established with a primary purpose of keeping track of all the patients seen in the Clinic. A secondary purpose was to facilitate information distribution by enabling more efficient and timely mail-out information to former patients, and other members of the public who have expressed an interest in the services, including the informational services, provided by Dr. Lycka.

In addition to the patients seen in the Clinic, clients who use the services of Corona, or who attend any of its seminars are asked if they wish to be included in the data base. Likewise, people who donate to the Foundation are given the same choice.

Some of the people in the database overlap in utilizing the services of the Clinic, the seminars and the Foundation. Any mailout can be sent to everyone in the database or only to those individuals who have used the services of a specific Respondent.

[para 21] The Professional Corporation says that the Database was established in 2000 from the information it had collected from individuals who had recently attended at the Clinic. In 2004, a new Patient History Form (“Form”) was developed that patients completed when they returned to the Clinic. The Professional Corporation says that the Database was updated to include “consent” and more information (gender and services requested) about 18 months before the complaints arose that gave rise to the Inquiry.

[para 22] The Professional Corporation says that the primary purpose of the Database is “keeping track of all the patients seen in the Clinic” and the secondary purpose is to “facilitate information distribution” to patients and non-patients. The Professional Corporation says the Database began with just Clinic patients, but now includes other individuals such as Corona clients, Corona seminar attendees and Foundation donors. The Database is shared with Corona and the Foundation.

[para 23] The Professional Corporation’s initial written submission contains eight tabs and a “Table of Authorities”, which are some of the same Tabs provided in Order H2007-001. The first six tabs are:

- *Tab 1: 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 2: Canadian Skin Cancer Foundation Registered Objects (Foundation)*
- *Tab 3: Question 40, Patient History Form (Clinic)*
- *Tab 4: Consent Form (Foundation)* - This one-page form is addressed, “Dear Valued Patient”. Within this 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 5: Chart Pulling Procedures (Clinic)*
- *Tab 6: Letters re: Party for Dr. Lycka*
 - *First letter: April 2006 (Professional Corporation)* - This four-page package begins, “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 contains the signature and typewritten title of the Controller of the Professional Corporation.
 - *Second letter: Undated (Professional Corporation)* - This undated letter is the letter that the Complainant received on June 13, 2006 and attached to her initial

submission as part of Document #1. This letter is addressed to the recipient by first name and says, “[D]isappointed and saddened am I”. The letter says, “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: June 2006 (Foundation)* - This is the letter dated June 14, 2006 that the Complainant attached to her initial submission as Document #2. This letter is addressed to recipient by first name. The letter refers to the above described undated letter 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 contains the signature and typewritten name and title of the Office Manager of the Foundation and the typewritten name of Dr. Barry Lycka, FRCP of the Canadian Skin Cancer Foundation.

[para 24] The Professional Corporation takes the position that the mailings did not contravene PIPA. The Professional Corporation says the individuals 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 of the personal information is authorized under PIPA.

V. DISCUSSION OF PRELIMINARY ISSUE

Non-inquiry issue

[para 25] The Professional Corporation says:

The Complainants found the content of the letter to be rude and disrespectful. 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 says:

To date I have received four letters of correspondence over the past few months, of which the tone of today’s letter has infuriated me. I found all the correspondence to be inappropriately written, but the comment in today’s letter “*So, I’m writing again to make sure you still have a heart beat*” is so rude and disrespectful I have found the need to write a letter of complaint. ... This statement is not humour. This is a mean spirited statement.

The physician states he cares about skin cancer. I imagine that some of the 14,716 letters sent out arrived at an address where someone may have died because of skin cancer or other illness.

[para 27] I accept the Professional Corporation’s submission that whether this letter is “rude and disrespectful” is not relevant to the Inquiry. This Order takes the same approach as Orders H2007-001, H2007-003, H2007-004, P2007-006, P2007-007, P2007-008

and P2007-009, as well as Order P2007-012, which pertains to the same Complainant. I said that whether the letters were “insulting and in poor taste” or were “rude and disrespectful” was not relevant to the issues before the Inquiry. My jurisdiction at the Inquiry is restricted to collection, use and disclosure issues under PIPA.

[para 28] Although the content of the “offensive letter” is the main focus of the complaint, the Complainant also says that the Professional Corporation breached the privacy legislation in the collection, use and disclosure of her personal information. The facts of this situation are in contrast to the facts in Orders H2007-003 and P2007-008, where the content of the letter was the entirety of the complaint.

VI. DISCUSSION OF INQUIRY ISSUES

[para 29] This Order will first address the matters pertaining to burden of proof that are set out in Issues A through F, then the definitional matters in Issue G and then the substantive matters in Issues H through M.

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?

Burden of Proof

[para 30] This Order takes the same approach to burden of proof as Orders H2007-001, H2007-004 and P2007-006. The test adopted for allocation of burden of proof when PIPA is silent, is that the party who is in the best position to address the matters at issue has the burden of proof. Issue G pertains to definitional issues. In my view, applying the above test for burden of proof in the circumstances of this case means that neither party is in the better position to address these matters. Therefore, I find that neither party has the burden of proof for the definitional matters in Issue G.

[para 31] Applying the above test for allocating the burden of proof in this case means that the Complainant has the initial burden to show that personal information was collected, used and disclosed. If the Complainant discharges this initial burden, then the burden shifts to the Professional Corporation, as it is in the better position to address the substantive matters about whether any collection, use and disclosure is in accordance with PIPA.

[para 32] Therefore I find that in this case, the Complainant has the initial burden and the Professional Corporation has the further burden of proof under Issues H through M, to show that any collection, use and disclosure was in accordance with sections 7(1), 8, 11(1), 11(2), 12, 13, 14, 16(1), 16(2), 17, 19(1), 19(2) and 20 of PIPA.

ISSUE G: DID THE “ORGANIZATION” “COLLECT”, “USE” OR “DISCLOSE” “PERSONAL INFORMATION”, AS THESE TERMS ARE DEFINED IN PIPA?

[para 33] Issue G includes five sub issues that are whether there is an “organization”, a “collection”, a “use”, a “disclosure” and “personal information”. I will begin by considering whether there is “personal information” and then consider whether there is an “organization”. I will then address whether there is a “collection”, “use” or “disclosure”. If I find the answer to the above question in Issue G is “yes”, I go on to decide the substantive matters in Issues H through M.

Personal Information

[para 34] Section 1 (Definitions) of PIPA says:

1(k) “personal information” means information about an identifiable individual.

[para 35] The information that the Complainant complained about was her name and mailing address. I accept the submission of the Professional Corporation that the

Database contains the names and mailing addresses of individuals, and therefore, contains “personal information”, as defined in section 1(k) of PIPA. The parties do not dispute that the information at issue is “personal information”.

[para 36] In order for information to be “personal information” under section 1(k) of PIPA, the information must be about an identifiable individual. In my view, the Complainant’s name and mailing address is information about an identifiable individual. Therefore, I find that the Complainant’s name and mailing address in the Database is “personal information,” as defined in section 1(k) of PIPA.

[para 37] The November 24, 2006 letter provided by the Complainant at the Inquiry says, “[M]y name has been removed from the database”. I accept the evidence provided by the Complainant that her personal information was subsequently removed from the Database after she received the mailings from the Professional Corporation.

Organization

[para 38] PIPA says:

1(i) “organization” includes

(i) a corporation,

but does not include an individual acting in a personal or domestic capacity.

[para 39] The Complainant did not address whether the Professional Corporation is an “organization” under PIPA. However, the Complainant said her only contact with the Professional Corporation was through Dr. L., for the inquiry about the cosmetic procedure in 1999. I accept the Complainant’s submission that this was the extent of her relationship with the Professional Corporation.

[para 40] The Professional Corporation did not explicitly address whether it is an “organization” under PIPA, although it says that it collected and used the “personal information” in the Database in accordance with PIPA. The Professional Corporation says that Dr. L.’s clinical practice of dermatology is organized, for business purposes, under the Professional Corporation and that Dr. L. provides clinical services through the Professional Corporation, which operates a licensed non-hospital surgical facility and therapeutic lasers.

[para 41] The Professional Corporation says that Dr. L. provides a range of medical services that include cosmetic procedures and services that are privately paid for by the patients. Cosmetic procedures are typically privately paid services. I have no evidence before me to indicate that the cosmetic procedure at issue is otherwise, so I am treating the procedure that was the subject of the Complainant’s inquiry to Dr. L. as a privately paid service. In contrast to Orders H2007-001, H2007-003 and H2007-004, in this case Dr. L. is not a custodian under the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”).

[para 42] The Professional Corporation says that it has been in existence since 1996. However, Corporate Registry says the Barry Lycka Professional Corporation was registered as a medical professional corporation on August 31, 1989. I accept the date shown at Corporate Registry as the date when the Professional Corporation came into existence. Therefore, the Professional Corporation came into existence in 1989, which is before the Complainant made the inquiry to the Professional Corporation in 1999.

[para 43] For the above reasons, I find that the Professional Corporation is a “corporation” as defined in section 1(i)(i), and therefore, an “organization” under section 1(i) of PIPA.

Collection

[para 44] PIPA does not define “collect”. However, in Order H2007-001 that also pertains to the Database, I adopted the definition for “collect” that is set out in HIA, which is as follows:

1(1)(d) “collect” means to gather, acquire, receive or obtain health information.

[para 45] In regard to collection, the Complainant says that the Professional Corporation collected her name and mailing address in 1999 when she made the inquiry about the cosmetic procedure to Dr. L. I accept the Complainant’s submission on this point. Therefore, I find that the Professional Corporation collected the Complainant’s personal information directly from her in 1999.

[para 46] The Professional Corporation says that the Foundation was not yet a separate legal entity until 2003, but “fund raising efforts had been initiated prior to that time. These efforts were coordinated by Dr. Lycka personally.” I accept that Dr. L., through the Professional Corporation, was actively engaged in fundraising efforts on behalf of what eventually became the Foundation for some time before the Foundation was registered as a separate legal entity at Corporate Registry.

[para 47] In 1999 when the information was collected from the Complainant, the Professional Corporation was acting in multiple capacities. In my view, the Professional Corporation collected the information not only for the immediate purpose of responding to the Complainant’s specific inquiry about the cosmetic procedure through D. L. at the Clinic, but also for the additional and interrelated purposes of compiling a mailing list, sending the mailings and soliciting for fundraising.

[para 48] I accept the Professional Corporation’s submission that the Database consists of personal information that was previously collected. When the information was entered into the Database, the form in which the information was recorded changed from hard copy to electronic form. There is no evidence before me to suggest that the information in the Database was collected a second time from any source.

[para 49] In 1999 the Professional Corporation collected the Complainant's personal information for the immediate purpose of responding to the Complainant's inquiry about a cosmetic procedure. I accept the submission of the Professional Corporation that it also collected the personal information for the purposes of compiling a mailing list, sending the mailings and soliciting for fundraising. There is no evidence before me to show that there was any change of purpose when the information was entered into the Database in 2000 or sent in the mailings in 2006.

[para 50] I find that the Professional Corporation gathered, acquired, received or obtained the Complainant's personal information, and thereby, "collected" the personal information in 1999 when she made the inquiry to Dr. L. I also find that the information was collected not only for the purpose of responding to the Complainant's inquiry about the cosmetic procedure, but also for the additional purposes of compiling a mailing list, sending mailings and soliciting for fundraising.

Use

[para 51] PIPA does not define "use". However, in Orders H2007-001 and H2007-004 that also pertain to the Database, I adopted the definition for "use" that is set out in HIA, which is as follows:

1(1)(w) "use" means to apply health information for a purpose and includes reproducing the information, but does not include disclosing the information.

[para 52] The Professional Corporation says it used the personal information that it had previously collected from individuals, for purposes of entering the information into the Database in 2000. I accept the submission of the Professional Corporation that it was a use rather than a collection when it entered the information into the Database. This was a use of personal information that had already been collected.

[para 53] I accept the Professional Corporation's submission that it used the personal information for providing medical information services, compiling the mailing list, sending the mailings and soliciting for fundraising. I find that the Professional Corporation applied the Complainant's personal information for a purpose, and thereby, "used" the personal information under PIPA.

Disclosure

[para 54] Neither PIPA nor HIA define "disclose". However, in Orders H2007-001 and H2007-004 that also pertain to the Database, I adopted the definition for "disclose" that is set out in the health information legislation in Ontario (*Personal Health Information Protection Act, 2004, S.O 2004, c. 3, Schedule A ("PHIPA")*), which is as follows:

2. "Disclose", in relation to personal health information in the custody or under the control of a health information custodian or a person, means to make the information

available or to release it to another health information custodian or to another person, but does not include to use the information, and “disclosure” has a corresponding meaning.

[para 55] The meaning of “disclose” can be inferred from the wording of Division 5 (Disclosure of Personal Information) under Part 2 (Protection of Personal Information) of PIPA. For example, sections 20 and 21 of PIPA address situations where organizations make information available or release information to other organizations. In my view, there is disclosure when an organization makes information available or releases the information to an outside entity such as another organization.

[para 56] The Complainant says the Professional Corporation disclosed her name and mailing address to the Foundation and that this was evident when she received the letters from the Foundation. However, the Professional Corporation denies that it disclosed personal information saying, “[I]t was not disclosed to anyone else.” The Professional Corporation says the Database is located within the Clinic, and therefore, it was a use when the personal information was entered into the Database.

[para 57] The Professional Corporation says the Foundation is now a separate legal entity from the Professional Corporation, although these entities began as a single entity. The Professional Corporation says these entities are now “related but separate” organizations that were initially “mixed with the Clinic”. For example, Dr. L.’s name appears on the Foundation consent form as “Barry S. Lycka, MD, FRCPC”.

[para 58] It is not clear from the wording on the form whether Dr. L. is acting on behalf of the Foundation, on behalf of the Professional Corporation, or alternatively, as an independent treating physician. The Foundation form begins with, “Dear Valued Patient”, as if Dr. L. is acting in the capacity of the patient’s treating physician. However, the Foundation form indicates otherwise where it states that Dr. L. is “intimately involved” with the Foundation.

[para 59] The letters from the Professional Corporation refer to recipients as “patients”, but request donations for the Foundation and offer prizes from Corona. The individuals involved hold multiple roles in these entities. For example, the Professional Corporation is Dr. L.’s professional corporation, but Dr. L. is a physician at the Clinic and the President of the Foundation. The Controller of the Professional Corporation is also the Secretary of the Foundation.

[para 60] I accept the evidence of the Professional Corporation that the Database evolved along with all of these entities. The Database was formed in 2000, which was before the Foundation became a separate legal entity but shortly after the Complainant made her inquiry in 1999. Although the Database began as a mechanism to keep track of patients, the Database changed to include non-patients. The Clinic is no longer the only source of information for the Database, which now includes information from Corona and the Foundation.

[para 61] In my view, when the Foundation became a separate legal entity, the continued access to the Database by that separate organization became a collection by

the Foundation and a simultaneous disclosure by the Professional Corporation. The Foundation was registered as an Alberta Society on October 31, 2003. At least from this time onwards the Professional Corporation disclosed the information in the Database to the Foundation, because the information was made available to a separate organization.

[para 62] The Professional Corporation says that the letters sent to the Complainant were not a disclosure to the Complainant because this is merely giving an individual their own information. I agree that it was not a disclosure for the Complainant to receive her own information. However, I also agree with the Complainant that there was a disclosure before the mailing, which occurred when the Professional Corporation made the information in the Database available and released the information to the Foundation in order for the mailing to occur.

[para 63] Disclosure means to make information available or to release information to another organization or entity. In my view, the Professional Corporation disclosed the Complainant's personal information when the information in the shared Database became available to a separate legal entity. Disclosure to the Foundation occurred at least by the time the Foundation became a separate legal entity in October of 2003. When the Complainant received the letters from the Foundation, she became aware of the previous disclosure that had been made by the Professional Corporation to the Foundation.

Summary

[para 64] In summary, under Issue G, I have determined that the "Organization" did "collect", "use" and "disclose" "personal information", within the meaning of these terms in PIPA. As my answer to the question in Issue G is "yes", I will now decide the substantive matters in Issues H through M.

[para 65] My findings under Issue G mean that the Complainant has discharged her initial burden of proof to show that the Professional Corporation collected, used and disclosed her personal information. This also means that the burden of proof now shifts to the Professional Corporation for the substantive issues to show that the collection, use and disclosure of the personal information was in accordance with 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 (INDIRECT COLLECTION WITHOUT CONSENT)?

Grandfathering

[para 66] The application of PIPA to personal information is set out under Part 1 (Purpose and Application) of PIPA. Section 4(4) reads:

- 4(4) If an organization has under its control personal information about an individual that was acquired prior to January 1, 2004, that information, for the purposes of this Act,
- (a) is deemed to have been collected pursuant to consent given by that individual,
 - (b) may be used and disclosed by the organization for the purposes for which the information was collected, and
 - (c) after coming into force of this Act, is to be treated in the same manner as information collected under this Act.

[para 67] Section 4(4)(a) of PIPA says the personal information that was collected before PIPA came into force on January 1, 2004, is deemed to have been collected pursuant to consent given by the individual. The effect of section 4(4) of PIPA is that the

information can be used and disclosed by the organization for the purposes for which the information was collected.

[para 68] However, notwithstanding the grandfathering provision the general PIPA rules continue to apply to situations that fall outside of sections 4(4)(a) and 4(4)(b), pursuant to section 4(4)(c) of PIPA. For example, if the personal information is used or disclosed for a different purpose than the purpose for which the information was collected, then the information would fall outside of section 4(4)(b) of PIPA.

[para 69] The Complainant says that her only contact with the Professional Corporation was when she made the inquiry to Dr. L. about a cosmetic procedure in 1999. The Complainant says that she never returned to the Clinic, has never been a patient of Dr. L.'s and did not complete the new Patient History Form that was introduced at the Clinic in 2004. I accept the Complainant's statement as to these facts.

[para 70] As the Complainant's personal information was collected in 1999, the information was collected *before* PIPA came into force. This means that the personal information is deemed to be collected by the Professional Corporation with the consent of the Complainant and in accordance with PIPA, under section 4(4)(a) of PIPA. This also means that the Professional Corporation has authority under PIPA to use and disclose the information for the purposes for which it was collected, pursuant to section 4(4)(b) of PIPA.

[para 71] Therefore, I find that the personal information is deemed collected by the Professional Corporation with consent given by the Complainant, pursuant to section 4(4)(a) of PIPA. As the personal information was collected for purposes of compiling a mailing list, sending mailings and soliciting for fundraising, I find that the Professional Corporation is authorized to use and disclose the information for those purposes under section 4(4)(b) of PIPA.

[para 72] In my view, the Professional Corporation had the authority to collect, use and disclose the personal information pursuant to deemed consent under section 4 of PIPA. Consequently, the collection, use and disclosure were in accordance with PIPA. Therefore, I find that the Professional Corporation collected, used and disclosed the Complainant's personal information pursuant to the authority of deemed consent and in accordance with section 4(4) of PIPA.

[para 73] Due to the finding that the personal information was collected, used and disclosed in accordance with section 4(4) of PIPA, I do not find it necessary to consider whether the Organization also had the authority to collect, use and disclose the information in accordance with sections 7(1), 8, 11(1), 11(2), 12, 13, 14, 16(1), 16(2), 17, 19(1), 19(2) and 20 of PIPA, under Issues H, I, J, K, L and M.

VII. ORDER

[para 74] I make the following Order under section 52 of PIPA:

[para 75] I find that:

- ISSUE A: Neither party has the burden of proof for the definitional issues (personal information, organization, collect, use and disclose);
- ISSUES B-F: The Complainant has the initial burden and the Organization has the further burden of proof under Issues H through M, to show that any collection, use and disclosure was in accordance with sections 7(1), 8, 11(1), 11(2), 12, 13, 14, 16(1), 16(2), 17, 19(1), 19(2) and 20 of PIPA;
- ISSUE G: The “Organization” “collected”, “used” and “disclosed” “personal information” within the meaning of these terms in PIPA;
- The Organization collected, used and disclosed the personal information in accordance with PIPA, pursuant to section 4(4) of PIPA;
- ISSUES H-M: Due to the finding that the personal information was collected, used and disclosed in accordance with section 4(4) of PIPA, I do not find it necessary to consider whether the Organization also had the authority to collect, use and disclose the information in accordance with sections 7(1), 8, 11(1), 11(2), 12, 13, 14, 16(1), 16(2), 17, 19(1), 19(2) and 20 of PIPA, under Issues H, I, J, K, L and M.

Noela Inions, Q. C.
Adjudicator