

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-012

January 29, 2008

CANADIAN SKIN CANCER FOUNDATION

Case File Number P0489

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

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

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

The matter was set down for a written inquiry ("Inquiry"). The Inquiry was held in conjunction with an inquiry for Case File Number P0482, which resulted in Order P2007-011 and involves the same Complainant and the Professional Corporation. 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 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 connection with any commercial activity. Due to the above finding, there was no jurisdiction to decide any of the Inquiry issues.

Orders Cited: AB HIA: H2007-004, H2007-003, H2007-001; **AB PIPA:** P2007-011, P2007-009, P2007-008, P2007-007 and P2007-006.

Statutes Cited: *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) and 56(3).

I. BACKGROUND

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

[para 2] Dr. L. created a mailing list ("Database") that includes individuals who make inquiries at the Clinic. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The Complainant said 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 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 P0482, which resulted in Order P2007-011 and involves the same Complainant and the Professional Corporation. 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.

[para 5] 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.

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 Foundation to collect, use and disclose personal information for purposes of 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 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 (limitation on sources for collection)?

[para 9] The Inquiry pertains only to collection, use and disclosure of personal information for purposes of 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.

IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

The complainant

[para 10] 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 Order P2007-011, which will not be repeated in this Order.

[para 11] In her initial written submission, the Complainant said that her only contact with Dr. Barry Lycka was an inquiry about a cosmetic procedure in 1999. She received three pieces of correspondence from the Professional Corporation that were solicitations for fundraising for the Foundation. The Complainant received two further pieces of correspondence from the Foundation, which were essentially letters of apology for the third letter from the Professional Corporation.

[para 12] The Complainant provided five Documents as evidence, which included the third letter from the Professional Corporation as well as the two letters that she received from the Foundation.

The Foundation

[para 13] The more complete version 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 in a previous Order will not be repeated in this Order.

[para 14] The submission provided by the Foundation 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 Foundation's submission describes the development of the Database and the evolution of the relationships that existed among Dr. L., the Clinic, the Professional Corporation, Corona, Endermologie Centre Corporation ("Endermologie") and the Foundation.

[para 15] The Foundation says that the Database was established in 2000, but "major changes" were subsequently made. In 2004, a new Patient History Form ("Form") was developed, which patients completed when they returned to the Clinic. The Foundation says that the Database was updated, which included a "consent" and additional information (i.e., gender and services requested), 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, which were done on April 10, 2006, May 23, 2006, June 12, 2006 and June 19, 2006. The Foundation’s initial written submission contains the following tabs that specifically pertain to the Foundation:

- *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)* - 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.

[para 18] The Foundation takes the position that the mailings did not contravene PIPA. The Foundation says that Clinic patients and other 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 ISSUES

Non-inquiry issue

[para 19] The Foundation 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 20] 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.

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 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 21] I accept the Foundation'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 P2007-011, which pertains to the same Complainant. I said that whether the letters were "insulting and in poor taste" or "rude and disrespectful" was not relevant to the issues before the Inquiry.

[para 22] My jurisdiction at the Inquiry and the scope of this Order are restricted to the collection, use and disclosure issues before the Inquiry, as those issues pertain to the Foundation under PIPA. Section 52 allows me to issue an Order requiring organizations to stop collecting, using or disclosing personal information in contravention of PIPA (section 52(3)(e)), or to destroy personal information collected in contravention of PIPA (section 52(3)(g)).

Commercial activity

[para 23] 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. The Foundation says it is a non-profit charitable organization that was registered as a non-profit society in 2003. The Corporate Search provided under Tab 1 of the Foundation's submission shows that the Foundation was registered as an Alberta Society on October 31, 2003.

[para 24] 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 25] 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 therefore, as a general rule, PIPA does not apply to the Foundation by virtue of section 56(2) of PIPA.

[para 26] 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 27] 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, P2007-008 and P2007-009. 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.

[para 28] The Complainant did not provide any evidence to show that the Foundation is engaged in any commercial activity with respect to her personal information. However, the Foundation provided evidence of its non-profit status under the *Societies Act* in Alberta. The only evidence I have before me shows that the soliciting for fundraising by the Foundation was an activity that was conducted solely for fundraising for charitable purposes, rather than to raise funds for regular operations or for other non-charitable purposes.

[para 29] 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 fundraising lists, pursuant to section 56(1) and section 56(3) of PIPA.

[para 30] For all of the above reasons, I find that 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 any commercial activity.

[para 31] Furthermore, it was the Professional Corporation that sent the Complainant the three letters that were solicitations for fundraising. The two letters from the Foundation, dated June 14th and June 19th, are for the most part, letters of apology for the previous letter that was sent from the Professional Corporation.

VI. DISCUSSION OF INQUIRY ISSUES

[para 32] Due to my finding that PIPA does not apply to the Foundation in the circumstances of this case, 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 33] 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 34] I make the following Order under section 52 of PIPA:

- I find that 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 connection with any 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