

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2012-05

July 31, 2012

PETER CHOATE & ASSOCIATES LTD.

Case File Number P1641

Office URL: www.oipc.ab.ca

Summary: Two individuals made complaints to this office under the *Personal Information Protection Act* (PIPA) that their personal information had been improperly collected, used and disclosed by Peter Choate and Associates Ltd. (the Organization).

The daughter of Complainant 1 was attending counseling sessions with a social worker (the Social Worker) employed by the Organization. Complainant 1 called the Social Worker to talk about the possibility of participating in the counseling, but initially decided against participating. Days later, he reconsidered and called the Social Worker to set up an appointment for both himself and Complainant 2, his partner. The Social Worker prepared a Progress Report related to the daughter's counseling for, and at the request of, Complainant 1's ex-spouse (the daughter's mother).

The Social Worker included as part of the Progress Report that Complainant 1 had called the Social Worker to inquire about the daughter's counseling and initially was not willing to pay for a session with the Social Worker. She stated that Complainant 1 later agreed to meet for a session with his partner (Complainant 2). Finally, the Social Worker stated in the Progress Report that when she met with Complainant 1, he indicated that he would sign the consent form for the counseling process only under duress, a condition under which the Social Worker decided that she could not proceed. The Progress Report did not specify whether Complainant 2 actually attended the meeting with Complainant 1, as planned. The Progress Report was later referred to by counsel for Complainant 1's children in a custody proceeding between Complainant 1 and his ex-spouse.

The Complainants complained that the Organization did not have authority to disclose their personal information to the ex-spouse. They were also concerned about the Organization's collection of their personal information.

The Complainants also argued that the Organization failed to provide them with written information about its privacy policies and practices upon request, as required by PIPA.

The Organization argued that some of the information being complained about was not personal information under PIPA. It argued that the use and disclosure of the personal information in the Progress Report was for the purpose of a legal proceeding, and therefore authorized without consent under PIPA. It also argued that the disclosure of some of the personal information was authorized under the *Family Law Act*.

The Adjudicator found that all of the information at issue in the inquiry was personal information of the Complainants under PIPA. She determined that the Complainants were deemed to have consented to the collection of their personal information by the Organization, but not to the use or disclosure in the Progress Report.

The Adjudicator determined that the *Family Law Act* authorized the disclosure of some, but not all, of Complainant 1's personal information in the Progress Report, but did not authorize the disclosure of Complainant 2's personal information. She determined that the Organization did not have authority under PIPA to use and disclose of some of Complainant 1's personal information and all of Complainant 2's personal information at issue.

The Adjudicator found that the Organization fulfilled its obligation to have privacy policies and practices, and that there was insufficient evidence to conclude that the Organization failed to provide written information about these policies and practices upon request.

Statutes Cited: AB: *Health Information Act*, R.S.A. 2000 c. H-5 s. 3, *Family Law Act*, S.A. 2003, c. F-4.5, s. 20, 21, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s.3, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 4, 6, 7, 8, 10, 11,13, 14, 16, 17, 19, 20, 52.

Authorities Cited: AB: Orders F2009-048, F2011-019, H2004-005, P2005-001, P2006-008, P2008-010.

Cases Cited: *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, (*United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*), 2012 ABCA 130.

I. BACKGROUND

[para 1] Two individuals made complaints to this office under the *Personal Information Protection Act* (PIPA) that their personal information had been improperly collected, used and disclosed by Peter Choate and Associates Ltd. (the Organization).

[para 2] The daughter of Complainant 1 was attending counseling sessions with a social worker (the Social Worker) employed by the Organization. It was suggested to Complainant 1 (presumably by his ex-spouse, the daughter's mother) that he may want to participate. Complainant 1 called the Social Worker to talk about this possibility and initially declined to participate. Days later, he reconsidered and called the Social Worker to set up an appointment. Complainant 1 attended the appointment with Complainant 2, his partner.

[para 3] The Social Worker took notes of the telephone call with Complainant 1, and of the meeting with both Complainants. The Social Worker later prepared a Progress Report related to the daughter's counseling for, and at the request of, the ex-spouse.

[para 4] The Social Worker included as part of the Progress Report that Complainant 1 had called the Social Worker to inquire about the daughter's counseling and initially was not willing to pay for a session with the Social Worker. She stated that Complainant 1 later agreed to meet for a session with his partner (Complainant 2). Finally, the Social Worker stated in the Progress Report that when she met with Complainant 1, he indicated that he would sign the consent form for the counseling process only under duress, a condition under which the Social Worker decided that she could not proceed. The Progress Report did not specify whether Complainant 2 actually attended the meeting with Complainant 1, as planned. The Progress Report was later referred to by counsel for Complainant 1's children in a custody proceeding between Complainant 1 and his ex-spouse.

[para 5] The Complainants argued that the collection of their personal information, and subsequent use and disclosure in the Progress Report was unauthorized.

[para 6] The Commissioner authorized an investigation of this complaint. This did not resolve the matter and it was set down for a written inquiry.

II. INFORMATION AT ISSUE

[para 7] The information at issue is the information collected, used, and disclosed by the Organization.

III. ISSUES

[para 8] The Notice of Inquiry states the issues for inquiry as the following:

- 1. Was the collection, use and/or disclosure of the Complainants' personal information excluded from the application of PIPA by virtue of section 4(3)?**
- 2. Was the collection, use and/or disclosure of the Complainants' personal information permitted by virtue of section 4(5)(b) (PIPA not to be applied so as to limit information available by law)?**
- 3. Did the Organization comply with section 6 of PIPA (duty to develop and follow policies and practices)?**

- 4. Did the Organization collect, use and/or disclose the Complainants' personal information in contravention of PIPA?**
- a. Did the Organization collect, use and/or disclose the Complainants' personal information, as that term is defined in PIPA?**
 - b. If so, did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authority or consent)? In particular,**
 - i. Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by section 14, 17 and/or 20 of PIPA?**
 - ii. If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainants' consent in accordance with section 8 of PIPA before disclosing the information? In particular,**
 - 1. Did the Complainants consent in writing or orally, in accordance with section 8(1)? Or**
 - 2. Are the Complainants deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or**
 - 3. Was the collection, use and/or disclosure permitted by virtue of the conditions in sections 8(3)(a), (b) and (c) having been met?**
 - c. Did the Organization collect, use, and/or disclose the information contrary to, or in accordance with, section 11(1), 16(1) and/or 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?**
 - d. Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, section 11(2), 16(2) and/or 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?**
 - e. Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide, and did it provide, notification before or at the time of collecting the information?**

IV. DISCUSSION OF ISSUES

[para 9] The Complainants include in their submissions arguments on issues such as parental alienation, how the Social Worker conducted her counseling sessions with the daughter, the

Social Worker's credentials, and professionalism of the various counsel involved in the custody dispute between Complainant 1 and his ex-spouse. These matters are not at issue in this inquiry.

[para 10] The Complainants also make arguments about a "release of information" form signed by the ex-spouse, in relation to the Progress Report. It is my understanding that this release relates to the disclosure of information by the Social Worker to the respective counsel for the ex-spouse and children, and not the disclosure of the Progress Report to the ex-spouse. This release is therefore not relevant to the issues in this inquiry.

[para 11] The Complainants' argued that the collection of their personal information "violated section 10", and that the Organization has to "justify the collection of the information was not in violation of Section 10." Section 10 prohibits an organization from obtaining or attempting to obtain consent through deceptive or misleading practices.

[para 12] The Complainants did not raise this issue in their requests for inquiry. As such, section 10 was not listed in the Notice of Inquiry, nor was it specifically addressed by the Organization. As the Organization was not asked to respond to the Complainants' allegations on this point, I will not consider the application of section 10 in this inquiry.

[para 13] The Complainants argue that because the Social Worker faxed the Progress Report to the fax number of the ex-spouse's parents, she faxed sensitive personal information without being certain that she was faxing it to the correct person. This issue was not raised by the Complainants prior to their rebuttal submissions. As such, it is not at issue in this inquiry.

[para 14] The Complainants repeatedly argue that if I am to find in favour of the Organization, "[Complainant 1] insists upon an order from the Privacy Commissioner to/against [the Organization], instructing them to release all documentation regarding the counseling and therapy sessions attended by the children... and [the ex-spouse]." If the Complainants wish to make an access request to the Organization under PIPA for their own personal information, they may do so. However, PIPA does not provide the right of access to information in the custody or control of an organization that is not the personal information of the applicant.

1. Was the collection, use and/or disclosure of the Complainants' personal information excluded from the application of PIPA by virtue of section 4(3)?

[para 15] The Complainants' submissions indicate that section 4(3)(k) was an issue during the earlier investigation of the complaint. However, the Organization has not provided arguments in its submissions before me as to the application of this provision. The provision reads as follows:

4(3) This Act does not apply to the following:

...

(k) personal information contained in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master in chambers of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace

Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;

...

[para 16] The Complainants state that the Progress Report, although referred to in a custody proceeding, was not put before the Court and was not part of the court file. Regardless of whether the Progress Report was introduced into the court file at a later time, the issue in this inquiry is the collection of the Complainants' personal information, and the use and disclosure of that information in the Progress Report that was provided by the Organization to the ex-spouse *prior to* the custody proceeding. In other words, the collection, use and disclosure of the personal information at issue occurred before the Progress Report in which the personal information appears became part of a court file (if it ever did). Therefore section 4(3)(k) does not apply.

2. Was the collection, use and/or disclosure of the Complainants' personal information permitted by virtue of section 4(5)(b) (PIPA not to be applied so as to limit information available by law)?

Section 4(5)(b) states:

4(5) This Act is not to be applied so as to

...

(b) limit the information available by law to a party to a legal proceeding,

...

[para 17] The Organization argues that the Complainants "attempted to limit information clearly available to [the ex-spouse and the daughter] by law, seemingly to affect a legal proceeding involving the interest of the children."

[para 18] I agree with the Organization that a custody proceeding is a legal proceeding as defined in section 1(1)(g) of the Act:

1(1) In this Act,

...

(g) "legal proceeding" means a civil, criminal or administrative proceeding that is related to

(i) a breach of an agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) a remedy available at law;

[para 19] Section 4(5)(b) mirrors similar provisions in the *Health Information Act* (HIA) and the *Freedom of Information and Protection of Privacy Act* (FOIP Act) (sections 3(a) and 3(c), respectively). These provisions have been considered in past orders of this office.

[para 20] In Order H2004-005, the Commissioner concluded that section 3(a) of the HIA does not remove the disclosure of personal information from the scope of that Act, even where the disclosure was made in the context of a legal proceeding.

[para 21] In Order F2009-048, I found that section 3(c) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) does not remove the disclosure of an individual's personal information by a public body from the scope of the Act, noting that

Section 40(1)(v) of the FOIP Act specifically permits a Public Body to disclose personal information for use in a court or quasi-judicial proceeding to which it is a party. As the Commissioner concluded with respect to the equivalent section in the HIA, it is unclear what the purpose of this provision would be if all disclosures by a public body of information that would otherwise be available by law to a party to legal proceedings were to be removed from the scope of the Act by section 3(c).

[Order F2009-048 at para. 20]

[para 22] In Order F2009-048 I also considered Order P2008-010, in which the Director of Adjudication considered, but did not reach a conclusion about, the interpretation of "available by law" under PIPA. The Director said:

It is an open and largely novel question, therefore, whether section 4(5)(b) is also meant to have the effect that provisions that control the collection, use and disclosure of information by organizations are not to be applied if applying them would mean that someone who wishes to introduce information into a court or tribunal proceeding would be prevented from collecting, using or disclosing the very information that they need in the proceeding. If section 4(5)(b) is to be interpreted in this way, it is also necessary to ask what 'available by law' is meant to convey in the context of such an interpretation. Possibly, section 4(5)(b) is to be read as affirming the ability to collect, use and disclose information, but only such information as was available to the party by the operation of a law or a legal process. Alternatively, given that information that is relevant to a legal proceeding may be admitted and considered by a court or tribunal, disallowing such information to be entered into the database, or to be used or disclosed for the purposes for which it was collected, could be said to entail limiting the information 'available by law (including the common law that allows the reception by courts of relevant evidence) to a party to a legal proceeding.'

[Order P2008-010, at para. 45]

[para 23] I reach the same conclusion with respect to section 4(5)(b) of PIPA as I did with respect to section 3(c) of the FOIP Act. In my view, for information to be "available by law", there must be a statutory or common law process *that makes the information available to a party to a proceeding*. The purpose of section 4(5)(b) is to ensure that the restrictions in PIPA are not interpreted so as to interfere with or override such a process. In other words, absent a statutory or common law process that makes the information available to a party to a proceeding, personal information in the possession of an organization that may be related to a proceeding is not "available by law" to the organization or anyone else the organization chooses to disclose the

information to, simply by virtue of the fact that there is a legal proceeding to which the information may relate. Therefore I conclude that section 4(5)(b) does not apply so as to permit the collection, use or disclosure of the Complainants' personal information in this case.

3. Did the Organization comply with section 6 of PIPA (duty to develop and follow policies and practices)?

[para 24] The relevant provisions of section 6 state:

6(1) An organization must develop and follow policies and practices that are reasonable for the organization to meet its obligations under this Act.

...

(3) An organization must make written information about the policies and practices referred to in subsections (1) and (2) available on request.

[para 25] The Complainants argue that the Organization "has failed to have policies and procedures to reasonably meet the obligations of this Act." The Complainants also allege that the Organization failed to provide written information about the policies and practices when the Complainants requested such during their meeting with the Social Worker.

[para 26] The Organization provided an affidavit sworn by the president of the Organization, stating that the Organization has had a written privacy policy in place since 2005. The Organization also provided me with a copy of the meeting minutes of the directors of the Organization, dated July 20, 2005, in which the privacy policy was passed, as well as a copy of the policy itself.

[para 27] The Complainants argue in their joint rebuttal submission, that the meeting minutes provided to me by the Organization do not establish who are the directors of the Organization, who was in attendance at the meeting, and who voted in favour of the policy. The Complainants also allege that the meeting minutes are incomplete and "therefore the meeting did not have quorum to meet and pass any business."

[para 28] There is nothing in PIPA that speaks to the passing of a privacy policy by the directing body of an organization. The Organization has provided me with a copy of its policy as well as evidence that this policy has been in effect since 2005. The policy itself addresses the collection of personal information from clients, a requirement for informed consent, a process for gaining informed consent from minors, the confidentiality of information, situations in which personal information may be disclosed without consent, records management and destruction of records, and the process for requesting access. I am satisfied that the Organization has met its requirements under section 6(1).

[para 29] The Complainants also state that the Organization's privacy policy does not establish training requirements for staff. Section 6 does not require an organization to specifically train employees or to include training requirements in a privacy policy.

[para 30] The Complainants both also complained that the Social Worker failed to provide them with a copy of the Organization's policy, which they have requested at the meeting with the Social Worker. In her affidavit, the Social Worker stated that neither Complainant made such a request to her and that she therefore did not refuse the request.

[para 31] The Organization provided me with the Social Worker's notes that she had written regarding her phone call and meeting with the Complainants. Nowhere in her notes, which are reasonably detailed, is there an indication that either Complainant made a request for written information about the Organization's privacy policy. In view of this, as well as the fact that the Organization had a written privacy policy in place at the relevant time that presumably could have been provided on request, I find that on the balance of probabilities, the Organization did not fail to provide the Complainants with written information about its privacy policies and practices.

[para 32] I find that the Organization met its obligations under section 6 of the Act.

4. Did the Organization collect, use and/or disclose the Complainants' personal information in contravention of PIPA?

a. Did the Organization collect, use and/or disclose the Complainants' personal information, as that term is defined in PIPA?

[para 33] The complaints and submissions of the Complainants are primarily concerned with the allegedly improper use and disclosure of personal information in the Progress Report. The Complainants also state that they did not consent to the collection of their personal information by the Social Worker.

[para 34] The Complainants have the initial burden of proof, in that they have to have some knowledge, and adduce some evidence, regarding what personal information was disclosed; the Organization then has the burden to show that its disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 35] The Act defines "personal information" as "information about an identifiable individual." The personal information at issue is information about the Complainants that was included by the Social Worker in her Progress Report: that Complainant 1 had called the Social Worker to inquire about the daughter's counseling and initially was not willing to pay for a session with the Social Worker; that Complainant 1 later agreed to meet for a session with his partner (Complainant 2); and that when Complainant 1 later met with the Social Worker, he indicated that he would sign the consent form for the counseling process only under duress, a condition under which the Social Worker decided that she could not proceed. The Progress Report did not specify whether Complainant 2 was present at that time.

[para 36] The Organization argues that the information related to Complainant 1 is not personal information under the Act. It states that "Personal Information does not include all information which may be recorded by an Organization in its dealings with an individual." As

support, it cites the following paragraph from the Alberta Court of Appeal decision in *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94:

The 'identifiable individual' term has two components. Firstly, the individual must be 'identifiable'. Generic and statistical information is thereby excluded, and the personal information (here the relevant number) must have some precise connection to one individual. Secondly, the information must relate to an individual. Information that relates to objects or property is, on the face of the definition, not included. The key to the definition is the word 'identifiable'. The *Act* is designed to regulate and protect information that is uniquely connected to one person. **An important (although not the only) purpose of the *Act* is to control the use of information that would enable 'identity theft', that is, information that is used to distinguish one individual from another in financial and commercial transactions.** This can be seen by reviewing the type of information that is dealt within the more specific provisions and exceptions in the *Act*. **The definition is not primarily aimed at information about that individual's opinions, choices and status in life.**

[at para. 47, emphasis added in Organization's submission]

[para 37] The Organization states that the only personal information about Complainant 1 that was collected, used and disclosed by the Organization was his name, since "[a]s stated by the Court of Appeal in *Leon's Furniture*, the definition of Personal Information is not aimed at information about an individual's opinions or choices. The fact that [the Social Worker] documented [Complainant 1's] opinion about, and choice not to participate in, the proposed counseling with [the daughter] does not engage the legislation at all. Information about [Complainant 1's] opinions and actions is not Personal Information as defined by and protected under PIPA."

[para 38] The Court in *Leon's* commented that PIPA is not *primarily* aimed at opinions, choices or status and that *one of* the purposes of the Act is to protect against 'identity theft'. In my view, these statements do not necessarily lead to the conclusion that the broad definition of personal information in PIPA specifically excludes information about an individual's choices, opinions or status, even if these elements are not, arguably, the primary focus of the Act. Further, the Court of Appeal more recently observed about the definition of personal information in PIPA, that "[i]t covers all personal information of any kind, and provides no functional definition of that term" (*United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130, at para. 73).

[para 39] I find that the information collected, used and subsequently disclosed in the Progress Report about both Complainants was their personal information as defined in the Act. As the use and disclosure of the personal information are linked (i.e. the information would not have been disclosed if the Social Worker had not used the information to create the Progress Report, and the Social Worker used the information in creating the report for the purpose of disclosing the information to the ex-spouse) I will consider the use and disclosure of the personal information together.

- b. If so, did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authority or consent)? In particular,**

i. Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by section 14, 17 and/or 20 of PIPA?

[para 40] For the reasons I set out below, I find that the Organization had consent to collect the Complainants' personal information. However, the Organization did not have consent to use or disclose that personal information in the Progress Report. Therefore I will consider whether the Organization had authority to use and disclose the personal information without consent under sections 17 and 20 of the Act, respectively.

[para 41] The Complainants have the initial burden of proof, in that they have to have some knowledge, and adduce some evidence, regarding what personal information was disclosed; the Organization then has the burden to show that its disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 42] The Social Worker states in a statutory declaration that she did not provide the Progress Report to the counsel for Complainant 1's ex-spouse or the counsel representing the children, but only to the ex-spouse. She states that she told the ex-spouse that she cannot release information to counsel without written consent from the ex-spouse, and sent the ex-spouse a consent form that would permit the disclosure.

[para 43] The Social Worker states that, although transcripts of a custody proceeding may indicate that the Social Worker provided the Progress Report directly to the children's counsel, she did not. In her affidavit, the Social Worker states that she was contacted by the children's counsel, who requested a copy of the Progress Report. The Social Worker states that she directed counsel to speak with the ex-spouse. In the transcripts of the custody proceeding, counsel states "I received this letter yesterday morning from [the Social Worker] after I had met with the children..." It is apparent from the context of the transcript that the "letter" referred to by counsel is the Progress Report. I note that counsel also referred to the Social Worker as a child psychologist although the credentials on the Progress Report identify her as a social worker. The above quote from the transcript may mean that counsel received the Progress Report directly from the Social Worker, or it may mean that counsel received the Report on the day referenced, and the Report is from, or created by, the Social Worker. The latter interpretation is consistent with counsel having received the Report from the ex-spouse.

[para 44] Given the ambiguity of the above-quoted statement, as well as the direct evidence offered by the Organization, I accept the Social Worker's statement that she disclosed the Progress Report only to the ex-spouse, and that the ex-spouse in turn provided the Report to counsel. It follows that only the inclusion of the Complainants' personal information in the Progress Report, and the disclosure of the information in that Report to the ex-spouse, is at issue; as the ex-spouse is not an organization under PIPA, I cannot review how she may have used or disclosed that Report after she received it.

[para 45] Complainant 2 states that the Social Worker disclosed her address and phone number to the ex-spouse and daughter, in addition to her name. The contact information of

Complainant 2 does not appear in the Progress Report. The Organization states that the Social Worker did not have this Complainant's address or phone number and there is no indication in the Social Worker's notes that this Complainant's contact information was requested or collected; obviously the Social Worker could not have disclosed information she did not possess. The Organization acknowledges that the Social Worker collected Complainant 2's first and last name and included this in the Progress Report.

[para 46] The Complainants state that the daughter and ex-spouse called Complainant 2 and showed up at her residence. However, though this indicates that the ex-spouse had the address and phone number of Complainant 2, there is no evidence that this information was given to the ex-spouse by the Social Worker. Given the Social Worker's detailed notes regarding her communications and interactions with the Complainants, I would expect some indication that the Social Worker collected or requested contact information from Complainant 2. I find that the Complainants have not met their burden to provide some evidence that the Social Worker disclosed her address or phone number to the ex-spouse.

[para 47] I will consider whether the use and disclosure of Complainant 2's name in the Progress Report, as well as Complainant 1's personal information, was authorized without consent.

[para 48] An organization may use and disclose personal information without consent if one of the circumstances listed in sections 17 and 20 exist. The relevant sections for this inquiry are below:

17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

...

(b) the use of the information is authorized or required by

(i) a statute of Alberta or of Canada

...

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

...

(b) the disclosure of the information is authorized or required by

(i) a statute of Alberta or of Canada,

...

[para 49] With respect to the use and disclosure of Complainant 2's name in the Progress Report, the Organization argues that sections 20 and 21 of the *Family Law Act* provides the ex-spouse, as a guardian of the children, the right to know the names of adults with whom her children were spending time.

[para 50] Regarding the use and disclosure of Complainant 1's personal information, the Organization argued that "even if the facts relating to [Complainant 1's] attitude toward counseling can be construed as Personal Information, the fundamental problem with [Complainant 1's] position is apparent when one considers what [the Social Worker] was to have done in discharging her obligations to her client in the child's best interests if she was somehow constrained by PIPA from reporting to [the daughter and ex-spouse] that she had, as planned, met with [Complainant 1] and that he was, as reported, uncomfortable with proceeding. ..."

[para 51] PIPA authorizes an organization to use and disclose personal information without the consent of the individuals the information is about, if the use and disclosure is authorized or required by law (sections 17(b)(i) and 20(b)(i), respectively).

[para 52] Based on the information provided to me by both the Organization and the Complainants, I am satisfied that the ex-spouse is a guardian pursuant to section 20 of the *Family Law Act*. Section 21 of the *Family Law Act* provides a list of responsibilities and privileges of guardians. The relevant portions of section 21 state the following:

- 21(4) Except where otherwise limited by a parenting order, each guardian is entitled*
- (a) to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers and responsibilities of guardianship described in subsection (5), and*
 - (b) to have sufficient contact with the child to carry out those powers and responsibilities.*
- (5) Except where otherwise limited by law, including a parenting order, each guardian has the following responsibilities in respect of the child:*
- (a) to nurture the child's physical, psychological and emotional development and to guide the child towards independent adulthood;*
 - (b) to ensure the child has the necessities of life, including medical care, food, clothing and shelter.*
- (6) Except where otherwise limited by law, including a parenting order, each guardian may exercise the following powers:*
- (a) to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and supervising the child's daily activities;*
 - (b) to decide the child's place of residence and to change the child's place of residence;*
 - (c) to make decisions about the child's education, including the nature, extent and place of education and any participation in extracurricular school activities;*
 - (d) to make decisions regarding the child's cultural, linguistic, religious and spiritual upbringing and heritage;*
 - (e) to decide with whom the child is to live and with whom the child is to associate;*
 - (f) to decide whether the child should work and, if so, the nature and extent of the work, for whom the work is to be done and related matters;*
 - (g) to consent to medical, dental and other health-related treatment for the child;*
 - (h) to grant or refuse consent where consent of a parent or guardian is required by law in any application, approval, action, proceeding or other matter;*

- (i) *to receive and respond to any notice that a parent or guardian is entitled or required by law to receive;*
- (j) *subject to the Minors' Property Act and the Public Trustee Act, to commence, defend, compromise or settle any legal proceedings relating to the child and to compromise or settle any proceedings taken against the child;*
- (k) *to appoint a person to act on behalf of the guardian in an emergency situation or where the guardian is temporarily absent because of illness or any other reason;*
- (l) *to receive from third parties health, education or other information that may significantly affect the child;*
- (m) *to exercise any other powers reasonably necessary to carry out the responsibilities of guardianship.*

[para 53] The Organization did not specify which subsections of section 21 it was relying upon as authority to use and disclose the Complainants' personal information in the Progress Report; however, sections 21(6)(e) and (l) are the most relevant provisions.

[para 54] The Organization argues that the ex-spouse has a right to know with whom her daughter spends time. I agree that section 21(6)(e) of the *Family Law Act* gives the ex-spouse, as a guardian, the right to decide with whom the daughter associates. However, this provision does not address the disclosure of information to a guardian regarding individuals with whom the daughter associates. In contrast, sections 21(6)(i) and (l) specifically reference a guardian's ability or power to receive information. In my view, only sections 21(6)(i) or (l) are relevant to the Organization's authority to use and disclose the Complainants' personal information in the Progress Report; section 21(6)(e) provides a guardian the ability to make a decision about who associates with his or her child but does not authorize an organization to disclose information about other individuals to the guardian.

[para 55] Regarding the application of section 21(6)(i), the Organization has not argued that the specific information in the Progress Report is part of a notice that the ex-spouse is entitled or required by law to receive. I find that this section does not apply to the circumstances here.

[para 56] Section 21(6)(l) empowers a guardian to receive health, education or other information that may significantly affect the child. In Order F2011-019, the adjudicator interpreted this provision to mean that a guardian has the ability to receive information from a public body that meets the stated criteria.

[para 57] The adjudicator in Order F2011-019 said:

However, in my view, section 21(6)(l) implicitly authorizes the disclosure of information that could significantly affect children under a former spouse's care, to the former spouse, should the CPS member, as a third party, decide to provide such information to her. There would be little value in legislating a right for a guardian to receive information from third parties if it is not implicit in this right that a third party may also provide or disclose the information to a guardian under the authority of this provision.

[Order F2011-019, at para. 31]

[para 58] I agree that this provision authorizes the disclosure of information to a guardian if that information is health, education or other information that may significantly affect the child. Even in the absence of section 21(6)(l) there is no legal impediment to the receipt of such information from third parties by guardians generally. Therefore, unless section 21(6)(l) is taken to implicitly authorize disclosure of such information to guardians by third parties, this provision would have no meaningful content. (In saying this I recognize guardians who are also organizations under PIPA would need a provision authorizing them to collect personal information. Arguably, the section 21(6)(l) of the *Family Law Act* is directed only at guardians who are organizations, and is intended to provide the requisite authority for collection. However, the rest of the provision in the *Family Law Act* is directed at guardians generally rather than those who are organizations. There is no reason to interpret this particular sub-clause as being limited in scope to a particular category of guardians in the absence of language to suggest this.)

[para 59] It seems to me that information about the daughter's counseling is information that could significantly affect the daughter. Complainant 1, the daughter's father, was asked to participate in her counseling; whether he chose to participate would have an effect on the daughter's counseling, and therefore on her. Further, the Progress Report indicates that the daughter was informed that Complainant 1 would not be participating. In my view, this is information that would have a significant impact on the daughter and for that reason, is information that is encompassed by section 21(6)(l). The ex-spouse has the ability to receive the information under the *Family Law Act*, and the Organization was therefore authorized to disclose this fact about Complainant 1 in the Progress Report.

[para 60] However, it is not clear to me that Complainant 2's name in the Progress Report is information that would significantly affect the daughter, especially as there is no reason to believe that Complainant 2 would be participating in any future counseling sessions. Unlike Complainant 1, Complainant 2 was not asked to participate in the counseling, and I have no evidence that the daughter was informed that Complainant 1 told the Social Worker that Complainant 2 would be at the meeting. The Organization has not provided any arguments to suggest that Complainant 2's intended attendance at the meeting (which is the context in which her name appeared in the Progress Report) had any effect on the daughter such that the ex-spouse had a right to the information.

[para 61] I make the same finding regarding Complainant 1's reasons for not participating in the counseling (both his reason for not participating in the first instance, and his refusal to sign the consent form). It may be the case that Complainant 1's reasons for not participating are somehow important to the daughter's counseling; however, the Organization has failed to provide me with sufficient evidence to reach this conclusion.

[para 62] I find that section 21(6)(l) of the *Family Law Act* and sections 17(b)(i) and 20(b)(i) of PIPA authorize the use and disclosure of the fact that Complainant 1 would not participate in the daughter's counseling in the Social Worker's Progress Report, without consent. However, these provisions do not authorize the use and disclosure of Complainant 1's reasons for not participating, or Complainant 2's personal information that was included in the Progress Report (her first and last name), without consent.

- ii. If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainants' consent in accordance with section 8 of PIPA before disclosing the information? In particular,**
- 1. Did the Complainants consent in writing or orally, in accordance with section 8(1)? Or**
 - 2. Are the Complainants deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or**
 - 3. Was the collection, use and/or disclosure permitted by virtue of the conditions in sections 8(3)(a), (b) and (c) having been met?**

[para 63] Section 8 of PIPA provides the methods of consent contemplated by the Act. The relevant portions are as follows:

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

...

[para 64] The Social Worker collected Complainant 1's personal information when she made notes during their telephone conversation and during their meeting, and collected Complainant 2's first and last name at the meeting. There is nothing in the submissions provided to me to indicate that the Social Worker collected personal information other than what the Complainants voluntarily provided to her at these times.

[para 65] Both Complainants were aware that the Social Worker was providing counseling services for Complainant 1's daughter. Complainant 1 phoned the Social Worker to inquire about participating, and both Complainants attending the meeting with the Social Worker for the purpose of participating (or to further inquire about participating) in the daughter's counseling; this purpose was obvious in both instances. The personal information at issue was provided by the Complainants to the Social Worker voluntarily, in a situation where a reasonable person would consider it reasonable to volunteer that information. I find that the requirements of section 8(2) are met, such that the Complainants may be deemed to have consented to the collection of their personal information by the Social Worker during the telephone call and meeting.

[para 66] I find that the Complainants can be deemed to have consented to the collection of their personal information under section 8(2).

[para 67] With respect to the use and disclosure of the Complainants' personal information in the Progress Report, Complainant 2 argues that by not signing the consent form given to her by the Social Worker at the meeting, she was expressly not allowing her information to be shared with the ex-spouse.

[para 68] The consent form addresses the disclosure of information provided in the course of therapy; the Complainants decided not to participate in therapy with the Social Worker, and so did not sign the consent form. The fact that the Complainants did not sign the form does not mean that the Social Worker was precluded from disclosing the fact that the Complainants would not be participating in the therapy to the ex-spouse. In other words, the consent form is not a relevant factor in this inquiry.

[para 69] However, it is clear that neither Complainant expressly consented to the use or disclosure of their personal information. With respect to the application of section 8(2) to the use and disclosure, the Organization argues that "[h]aving voluntarily agreed to meet with [the Social Worker] for the purpose clearly explained to him, it is only reasonable that [Complainant 1] would have expected [the Social Worker] to report to [the daughter and ex-spouse] that he was not prepared to participate."

[para 70] It is not clear to me that the Complainants volunteered the personal information that was used and disclosed in the Progress Report for the purpose of that use and disclosure, as required by section 8(2). Whether or not a reasonable person would conclude that telling the ex-spouse that Complainant 1 would not participate in the counseling sessions was appropriate or reasonable in the circumstances, the Social Worker's notes, which were provided as part of the Organization's submissions, show that Complainant 1 told the Social Worker that he did not want information to be disclosed to his ex-spouse. The deemed consent provision in section 8(2) of PIPA does not apply where the Complainants clearly expressed a desire not to have their personal information used or disclosed, even where that use or disclosure is reasonable in the circumstances.

[para 71] I found above that the use and disclosure of the fact that Complainant 1 would not participate in the counseling sessions was authorized without consent under section 20(b)(i) of the Act; however, the use and disclosure of the remaining information (i.e. the reasons that Complainant 1 would not participate, as well as Complainant 2's name) in the Progress Report was not authorized without consent. As I have found that the Organization did not have consent to use and disclose that personal information, I find that the Organization used and disclosed Complainant 2's personal information in the Progress Report, as well as the reasons for which Complainant 1 refused to participate in the counseling sessions, without authority under PIPA.

- c. Did the Organization collect, use, and/or disclose the information contrary to, or in accordance with, section 11(1), 16(1) and/or 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?**
- d. Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, section 11(2), 16(2) and/or 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?**

[para 72] As I have found that the Organization did not have authority to use or disclose Complainant 2's name in the Progress Report, or Complainant 1's reasons for not participating in the counseling sessions, I do not need to consider whether the Organization's purposes for the use and disclosure of that personal information were reasonable. However, I will consider the reasonableness of the purposes and the extent of the collection of the personal information, as well as the reasonableness of the use and disclosure of the fact that Complainant 1 would not participate in the counseling.

[para 73] The Organization collected the Complainant 1's personal information for the purpose of having the Complainants (specifically, Complainant 1) participate in counseling for his daughter. The personal information was used and disclosed in the Progress Report for the purpose of updating the ex-spouse (the daughter's mother) of the progress of the daughter's counseling. In my view, these are reasonable purposes.

[para 74] The Organization argues that the Social Worker acted reasonably and appropriately in the circumstances by "reporting nothing more in the Progress Report than the fact that she had met with [Complainant 1 and Complainant 2] and that [Complainant 1] was not prepared to participate...". As discussed above, the Social Worker also provided the reasons given by Complainant 1 when he declined to participate.

[para 75] I have found above that the Organization that the *Family Law Act* authorized the use and disclosure of some, but not all, of Complainant 1's personal information in the Progress Report. It also did not authorize the use and disclosure of Complainant 2's personal information. Therefore, the Organization used and disclosed more information than was reasonable for the purposes of updating the ex-spouse. Had the Organization provided me with an explanation as to how the reasons that Complainant 1 would not participate in the counseling, and the inclusion of Complainant 2's name in the Progress Report was information that would significantly affect the daughter, as set out in section 21(6)(1) of the *Family Law Act*, I may have found that the use and disclosure of that information in the Progress Report was also reasonable for the purpose of updating the ex-spouse. However, I was given no such information.

- e. Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide, and did it provide, notification before or at the time of collecting the information?**

[para 76] The relevant provisions of section 13 are as follows:

13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally

(a) as to the purposes for which the information is collected, and

(b) of the name or position name or title of a person who is able to answer on behalf of the organization the individual's questions about the collection.

...

(4) Subsection (1) does not apply to the collection of personal information that is carried out pursuant to section 8(2).

[para 77] PIPA requires organizations to notify individuals of the collection of personal information in certain circumstances. However, notification is not required where information is collected with deemed consent under section 8(2) because consent may be deemed only where the purpose is obvious and it is reasonable for an individual to provide their information for that purpose (section 13(4)). As I have found above that the Complainants may be deemed to have consented to the collection of their personal information within the terms of section 8(2), the notification requirements in section 13 do not apply.

V. ORDER

[para 78] I make this Order under section 52 of the Act.

[para 79] I find that the Organization fulfilled its obligations to have policies and practices that are reasonable to meet its obligations under PIPA. I also find that the Organization did not fail to provide written information about these policies and practices.

[para 80] I find that the Organization had authority to collect the Complainants' personal information.

[para 81] I find that the Organization had authority to use and disclose some, but not all, of Complainant 1's personal information. I find that the Organization did not have authority to use and disclose Complainant 2's personal information. Under section 52(3)(e), I order the Organization to stop using and disclosing the personal information Complainants that was used and disclosed without authority.

[para 82] I further order the Organization to notify me and the Complainants, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Amanda Swanek
Adjudicator