Office of the Information and
Privacy Commissioner of Alberta

December 20, 2013

Honourable Jonathan Denis
Minister of Justice and Solicitor General
403 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

Honourable Doug Griffiths
Minister of Service Alberta
104 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

Dear Minister Denis and Minister Griffiths,

Re: *Personal Information Protection Act*

On November 15, 2013, the Supreme Court of Canada issued its decision in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* (UFCW), ruling that the *Personal Information Protection Act* (PIPA) is unconstitutional and declaring it invalid. It gave the Alberta Legislature 12 months to bring the Act in line with the *Canadian Charter of Rights and Freedoms*. Minister Denis has declared the government's intention to amend PIPA to make it constitutional ("Commentary," *Edmonton Journal*, November 16, 2013). I have publicly stated that I would write to the government to provide my input on how it might correct the legislation, and that is the purpose of this letter.

Below, I offer an amending solution that would address the constitutional problems raised by the Court while also preserving an appropriate degree of protection for the personal information of Albertans, which is my mandate as Information and Privacy Commissioner of Alberta.

The importance of private-sector privacy legislation for Albertans cannot be overstated. In a public opinion survey conducted by my Office earlier this year, 93 per cent of the 800 respondents said it is important to protect the privacy of personal information. As the Supreme Court said in the UFCW decision, the ability of individuals to control their

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personal information "is intimately connected to their individual autonomy, dignity and privacy," and "fundamental values that lie at the heart of a democracy" underlie this control [para. 19]. Moreover, "legislation which aims to protect control over personal information should be characterized as 'quasi-constitutional' because of the fundamental role privacy plays in the preservation of a free and democratic society" [para. 19].

The reasons for which PIPA was passed in 2003 are equally valid today. Without PIPA, federal legislation (the *Personal Information Protection and Electronic Documents Act*) would have governed the protection of Albertans' personal information. By enacting PIPA, the Alberta legislature created a 'made-in Alberta' solution for protecting personal information. The Act applies to provincial organizations, largely small- and medium-sized businesses. It permits Albertans to seek a remedy for their access to information disputes, and complaints about how their personal information is dealt with, to an oversight body located in Alberta.

In contrast to federal legislation, PIPA gives Albertans access to an administrative review and complaint process that results in binding orders, a process already in place provincially for health information of individuals held by custodians and information about individuals held by public sector bodies. As well, PIPA provides protection for people in the provincial workforce and strikes a reasonable balance for the collection, use and disclosure of personal information in mergers and acquisitions.

Together with British Columbia, Alberta is a leader among the provinces with respect to private-sector privacy legislation. It has played a leading role in interpreting key provisions in the legislation. PIPA was reviewed by a Select Special Committee of the Legislature in 2007 and the resulting amendments for mandatory breach reporting made Alberta a leader internationally. Manitoba has recently passed its own private sector law, based largely on Alberta's PIPA, and conversations about similar legislation are occurring in Saskatchewan. By finding the best possible solution to the constitutional problem, Alberta can continue to move forward, maintaining its strong leadership role in private-sector privacy.

The first constitutional question the Supreme Court said it would address is whether PIPA violates the freedom of expression "insofar as [it] restrict[s] a union's ability to collect, use or disclose personal information during the course of a lawful strike" [para 9]. The Court also focused on picketing as a particularly important form of expression [para. 11]. When describing the constitutional problem in its decision further, the Court said: "the *Act* does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation" [para. 25]. It can be taken from this that the Court would see the provision of such a balancing mechanism to be the appropriate solution.

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In my view, the legislative response that would most directly address the constitutional problem the Court stated would be to **add authorizing provisions allowing the collection, use or disclosure of personal information by unions for expressive purposes without consent, in the context of picketing during a lawful strike.**

Other legislative options are available that would protect expressive activities of unions. For example, a somewhat broader exception could be enacted for expression by unions engaged in legitimate labour relations activities. However, this would go beyond the constitutional question stated by the Court. Even more broadly, union expression in the course of labour relations activities could be added to the exemption provisions that specify certain activities to which the Act does not apply. Finally, unions could conceivably be excluded from the Act altogether. However, in my view, neither of these latter mechanisms would permit the appropriate "balancing" called for by the Court. The result would be that expressive activities by unions that caused disproportionate harms, or were otherwise clearly unreasonable relative to the union's purposes, could not be enjoined. As stated in its decision, the Court's conclusion did not mean that it necessarily condoned all of the Union's expressive activities [para. 38].

Further, these alternate solutions would remove the protections in PIPA that ensure that personal information that is collected for a union's expressive labour relations purposes be appropriately secured, or destroyed when no longer needed. It would also remove the ability of individuals to request access to their own personal information collected by unions for such purposes.

The legislative response I have proposed would strike the appropriate balance between a union's freedom of expression during the course of a lawful strike and an individual's informational privacy. PIPA already contains provisions which authorize collecting, using and disclosing personal information necessary to comply with a collective agreement (sections 14(c.1), 17(c.1) and 20(c.1)), so an amendment addressing an aspect of labour relations activities that can be relied on by unions is not without precedent.

I anticipate that some will see the enactment of corrective legislation as an opportunity to propose amendments to PIPA on unrelated issues, but I would caution against that at this time. PIPA currently provides that a review of the Act by a special committee of the Legislative Assembly begin by July 1, 2015. It may not be possible to conduct a comprehensive review of the Act and enact the resulting legislation within the 12-month timeframe dictated by the Supreme Court. A failure to complete the amending process within this timeframe would bring the federal legislation into play, which would be undesirable for the reasons given above. Therefore, I strongly urge the government to proceed at this time with only the legislative changes required to make PIPA constitutionally compliant in

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accordance with the Court's direction, and to include in the corrective legislation a commencement date in the near future for a more fulsome review of the Act by a special committee.

I ask the government to proceed quickly on this matter so as to meet the Court's timeline and maintain the personal privacy protections that Albertans have come to expect.

Yours truly,

Jill Clayton
Information and Privacy Commissioner