

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2024-03

March 28, 2024

LOBLAW COMPANIES LIMITED

Case File Number 018070

Office URL: www.oipc.ab.ca

Summary: The Complainant is a PC Optimum loyalty program member. On June 1, 2020, he received an email from Shoppers Drug Mart, a division of Loblaw Companies Limited (the Organization), informing him that a team member had recently tested positive on a presumptive test for COVID-19 at a particular Shoppers Drug Mart location in Edmonton, and stating that out of an abundance of caution, it was notifying customers who recently transacted at this store (the COVID-19 Notification Email). The Complainant complained that the Organization used his email address without his consent in contravention of the *Personal Information and Protection of Privacy Act* (PIPA).

The Adjudicator found that section 17(i) of PIPA permitted the Organization to use the Complainant's email address without his consent to send him the COVID-19 Notification Email.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 7, 8, 13, 16, 17, and 52; *Public Health Act*, R.S.A. 2000, c. P-37.

Orders Cited: AB: P2010-02, P2012-09, P2012-10, P2013-07, P2014-03, P2022-01.

Cases Cited: AB: *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, *R. v. Church of the Vine and Fortin*, 2022 ABKB 704.

Cases Cited: Federal: *R. v. Find*, 2001 SCC 32.

I. BACKGROUND

[para 1] The Complainant is a PC Optimum loyalty program member. On June 1, 2020, the Complainant received the following email (the COVID-19 Notification Email) from Shoppers Drug Mart:¹

We are writing to inform you that a team member has recently tested positive on a presumptive test for COVID-19 at our Shoppers Drug Mart Standard Life Building, 10405 Jasper Ave NW location in Edmonton. This individual was last at the store on May 27th. Please note, they were not symptomatic at that time, and wore a mask throughout their shift.

Over and above our daily disinfectant protocols and the social distancing practices we put in place in response to COVID-19, we are taking the following steps:

1. Arranged for a thorough deep-clean and sanitization of the store. We expect to reopen as usual tomorrow morning,
2. Reaching out to the local public health authority to investigate the team member's recent shifts and direct contacts,
3. Instructed any potentially exposed team members to stay home and self-isolate, and
4. Out of an abundance of caution, we're notifying customers who recently transacted at this store.

We understand that you may have questions and want to assure you that we take your safety, and the safety of our team, very seriously. We will work with the local public health team on any further directions and encourage you to reach out to them if you need more information.

[para 2] On June 19, 2020, the Complainant submitted a Request for Review/Complaint form to this Office in which he stated:

I am making this complaint against Loblaw Companies Limited for the unauthorized use of my personal information.

I am a PC Optimum loyalty program member and received the attached email from Loblaw since I made a purchase at a store location that had an employee who received a positive COVID-19 test result in some undisclosed date range. My purpose for enrolling in the loyalty program was to receive benefits under the program.

Receiving this email from Loblaw, based on my review of the relevant privacy policy (<https://www.loblaw.ca/en/privacy.html>), is outside the parameters in section 3:

¹ In its initial submission dated September 29, 2022 Loblaw Companies Limited advised that Shoppers Drug Mart is a division of Loblaw that operates as a line of business within the larger organization and is a subsidiary entity of the parent organization (Loblaw). It stated that "Loblaw maintains ownership and control of the legal entity operating as Shoppers Drug Mart; however, it should be noted that its pharmacies operate primarily under a franchise model. Loblaw is responsible for compliance with regulatory obligations under the Alberta *Personal Information Protection Act* with the exception of those activities that occur within the pharmacy portion of its stores, as this is maintained by the franchise who would be responsible for its own operation and compliance. In this situation Loblaw was responsible for the entity that sent the COVID-19 notification email."

3. How Do We Use Personal Information?

We use your personal information to provide you with our programs, products and services, to manage our business operations, to communicate offers and information we think might interest you, to generally enhance your customer experience with us, and as permitted or required by law.

I followed-up with Loblaw to try and understand how the email was compliant, which they responded as being sent "...out of an abundance of caution..." which is not a permissible use in accordance with their privacy policy. They did not confirm that they were required to send it by law although requested twice to do so (which would make the email clearly within their privacy policy).

On a supplementary follow-up, Loblaw indicated they sent the email as "...information and updates in relation to our programs and services, which is in accordance with..." their privacy policy. I do not agree with their assessment since this did not provide me with any information regarding their programs or services. They further indicated this was sent "...as part of our services...", I disagree on this point as well since their services are retail sales not public health.

I am filing this complaint as I view this email communication as being outside the Loblaw privacy policy. Receiving this message was triggering, especially since it presented no useful information about my health, their products or services or operations. Notices of this type should generally be public (if at all) and not to a narrow segment of customers who utilize a loyalty program in connection with their store purchase. There is no connection between my loyalty membership and this communication from Loblaw. It is important, even during health pandemics that organizations operating in Alberta are in accordance with our privacy legislation and I appreciate your office's role in ensuring organizations are acting in accordance with our provincial privacy legislation.

[para 3] The Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter; however, the matter was not resolved and the Complainant requested an inquiry.

[para 4] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

II. ISSUES

[para 5] The Notice of Inquiry, dated August 9, 2022 states the issues for this inquiry as follows:

1. Did the Organization comply with section 13 of PIPA (notification required for collection)?
2. Did the Organization use the Complainant's personal information (his email address) in compliance with or in contravention of section 7(1)(c) of PIPA (consent required for use of personal information)? In particular,

- a. Did the Organization obtain the Complainant’s consent in accordance with section 8 of PIPA to use his email address to send him the COVID-19 Notification Email, before sending him the COVID-19 Email? In particular,
 - i. Did the Complainant consent in writing or orally (section 8(1)) to the use of his email address for this purpose?
 - ii. Is the Complainant deemed to have consented to the use of his email address for this purposes by virtue of the conditions of section 8(2)(a) and (b) having been met? or
 - iii. Is the use of the Complainant’s email address permitted by virtue of the conditions in section 8(3)(a), (b) and (c) having been met?
 - iv. Did the Organization use the Complainant’s email address for any purpose other than the particular purpose or purposes for which the information was collected (section 8(4))?

3. If the Organization did not have the Complainant’s consent to use his email address for the purpose of sending him the COVID-19 Notification Email, was the Organization permitted to use the Complainant’s email address to send him the COVID-19 Notification Email without his consent pursuant to section 17 of PIPA?

4. Did the Organization use the Complainant’s email [address] contrary to, or in accordance with section 16 of PIPA (use only for purposes that are reasonable and only to the extent that is reasonable for meeting the purposes for which the information is used)?

III. DISCUSSION OF ISSUES

1. Did the Organization comply with section 13 of PIPA (notification required for collection)?

[para 6] Section 13 of PIPA states, in part:

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 7] Section 8(2) of PIPA states:

8(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 8] Section 1(1)(k) of PIPA defines “personal information” as follows:

1(1) In this Act,

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

[para 9] The Complainant’s email address contained his first and last name. Previous Orders of this Office have determined that an individual’s email address is personal information about the individual.²

[para 10] The Organization does not dispute that the Complainant’s email address, which contained his name, is his personal information.³ I find that the Complainant’s email address is his personal information under section 1(1)(k) of PIPA.

[para 11] In its initial submission, the Organization provided the following information about how and when it informed individuals about the purposes for which it collected personal information:⁴

3. PC Optimum is a loyalty program operated by Loblaw and is available for use by our customers at a number of our retail businesses including Shoppers Drug Mart. As part of the PC Optimum onboarding process, customers are asked to [provide] their email address as a requirement for registration for the program. Customer email address allows the organizations to communicate both marketing and service messages with the customer in relation to their transaction history at our respective retail stores. As part of onboarding, prior to registering for the PC Optimum loyalty program, customers are asked to read and agree to both our privacy policy and the terms and conditions of the PC Optimum program which provides customers an understanding of how and when they may be communicated with as part of this program.

[para 12] In my letter dated October 12, 2022, I asked the Organization to provide the Complainant and me with a copy of the privacy policy that was in place when the Complainant signed up to participate in the PC Optimum loyalty program. I also asked the Organization to provide the Complainant and me with a copy of the privacy policy that was in place when it sent

² See, for example, Orders P2010-021 at para. 23, P2012-09 at para. 40, P2013-07 at para. 14, and P2014-03 at para. 15.

³ I note that the Organization’s Privacy Policy dated March 13, 2019 sets out a definition of “personal information” which includes an individual’s name and email address.

⁴ Organization’s initial submission dated September 29, 2022.

the COVID-19 Notification Email to the Complainant, if it was different from the privacy policy that was in place when the Complainant signed up.

[para 13] I further asked the Organization to tell the Complainant and me whether, when the Complainant signed up to be a member of the PC Optimum loyalty program, there was any other policy that informed the Complainant how his personal information would be collected, used and disclosed for the purpose of participating in the PC Optimum loyalty program, and if so, to provide the Complainant and me with a pdf copy of that policy.

[para 14] The Organization responded by way of letter dated October 18, 2022 and stated:

2. While we understand the request has been made for the Loblaw Privacy Policy at the time the Complainant signed up for the PC Optimum loyalty program and additional documents the Complainant would have agreed to, we contend that this information is not relevant to when the event took place. Organizations are able to change their policies and terms & conditions during the lifetime of their programs, products and services. As such, more relevant information would consist of the Loblaw Privacy Policy and Terms & Conditions of the PCO Optimum program that would have existed during the date of the event the Complainant has taken exception with (June 2020). Therefore, you will find in attached documentation the Loblaw Privacy Policy dated March 13, 2019 and the PC Optimum Terms and Conditions dated February 1, 2018. These documents would have existed at the time of the event the Complainant has taken issue with, and would have had to agree to in order to participate in the loyalty program.
3. It should be noted that the PC Optimum program only began on February 1, 2018 and that any changes to policies that would have occurred after an individual joined the program would have been communicated to them.

[para 15] The Organization provided the Complainant and me with a copy of the Loblaw Privacy Policy dated March 13, 2019 (the Privacy Policy) and the PC Optimum Terms and Conditions dated February 1, 2018 (the PCO T&Cs).

[para 16] The Complainant did not dispute that the Organization's Privacy Policy and the PCO T&Cs provided to him and to me in this inquiry, were the privacy policy and terms and conditions that were in effect when he received the COVID-19 Notification Email.

[para 17] Accordingly, I find that the Privacy Policy and the PCO T&Cs that were provided to me and to the Complainant in this inquiry, were the privacy policy and terms and conditions that were in effect when the Complainant received the COVID-19 Notification Email.

[para 18] I note that in section "1.B" of its Privacy Policy, the Organization states, in part, that:

The term "policy" also includes each of these specific privacy notices:

- A Loyalty Privacy Notice, specific to the PC Optimum program

...

[para 19] The Notice of Inquiry specifically stated in section “II. Documents”:

If the parties have evidence in the form of documents that relate to the issues in this case that are not attached to this Notice, they should include them with their initial exchangeable submission, in accordance with Inquiry: Preparing Submissions (attached).

[para 20] The Organization did not provide me with a copy of the “Loyalty Privacy Notice specific to the PC Optimum program”, and did not refer to it in its submissions. Accordingly, it is not before me for consideration in this inquiry.

[para 21] In its initial submission, the Organization stated:

. . . Section 3 of the Loblaw Privacy Policy indicates that “We use your personal information to provide you with our programs, products and services, to manage our business operations, to communicate offers and information we think might interest you, to generally enhance your customer experience with us, and as permitted or required by law. In light of our ability to provide electronic service messages as per CASL legislation, and to comply with public health recommendations relating to infection prevention and control guidance with regards to COVID-19, we contend that we fall within the scope of use as outlined in Section 3 of our Privacy Policy to use personal information as permitted or required by law. We also hold that by informing customers of potential COVID exposures at our locations enhances the customer experience as customers want to be ensured that when they physically enter a premises that they are entering an establishment that is treating their health with the utmost importance. Customers agree to our Privacy Policy upon PC Optimum account creation.

[para 22] Section 3 of the Organization’s Privacy Policy sets out the purposes for which the Organization collects personal information as required by section 13(1)(a). Section 10 of the Organization’s Privacy Policy sets out the contact information for privacy related questions as required by section 13(1)(b).

[para 23] Having reviewed the purposes set out in section 3 of the Organization’s Privacy Policy, I find that the Organization did not originally collect the Complainant’s email address in order to inform him of a possible exposure to COVID-19. I find that the language in the Organization’s Privacy Policy did not inform the Complainant that his email address would be used to notify him of a possible exposure to COVID-19. I find that using the Complainant’s email address to inform him of a possible exposure to COVID-19 was a new purpose.

[para 24] PIPA does not prevent an organization from using an individual’s personal information for a new or different purpose than what it was originally collected for; however, before using an individual’s personal information for a new or different purpose, an organization must either meet one of the requirements of section 8 (Form of consent), or ensure that the new or different use falls within one or more of the exceptions for consent set out in section 17 (Use without consent). This will be discussed further below.

2. Did the Organization use the Complainant’s personal information (his email address) in compliance with or in contravention of section 7(1)(c) of PIPA (consent required for use of personal information)? In particular,

- a. **Did the Organization obtain the Complainant’s consent in accordance with section 8 of PIPA to use his email address to send him the COVID-19 Notification Email, before sending him the COVID-19 Email? In particular,**
 - i. **Did the Complainant consent in writing or orally (section 8(1)) to the use of his email address for this purpose?**
 - ii. **Is the Complainant deemed to have consented to the use of his email address for this purposes by virtue of the conditions of section 8(2)(a) and (b) having been met? or**
 - iii. **Is the use of the Complainant’s email address permitted by virtue of the conditions in section 8(3)(a), (b) and (c) having been met?**
 - iv. **Did the Organization use the Complainant’s email address for any purpose other than the particular purpose or purposes for which the information was collected (section 8(4))?**

[para 25] Section 7(1)(c) of PIPA states:

7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,

...

(c) use that information unless the individual consents to the use of that information, or

...

[para 26] The Complainant argued that he did not consent to the Organization using his email address to inform him of a possible exposure to COVID-19.

[para 27] The Organization argued that the Complainant agreed to its Privacy Policy and PCO T&Cs and therefore consented to the Organization using his email address to notify him of a possible exposure to COVID-19. In the alternative, the Organization argued that section 17(a) and/or section 17(i) permitted it to use the Complainant’s email address without his consent to notify him of a possible exposure to COVID-19.

[para 28] I find that it is not necessary for me to determine whether the Complainant consented to the Organization using his email address for the purpose of notifying him of a possible exposure to COVID-19 since, for the reasons set out below, I find that section 17(i) permitted the Organization to use the Complainant’s email address for this purpose without his consent.

3. **If the Organization did not have the Complainant’s consent to use his email address for the purpose of sending him the COVID-19 Notification Email, was the Organization permitted to use the Complainant’s email address to send him the COVID-19 Notification Email without his consent pursuant to section 17 of PIPA?**

[para 29] As previously stated, an organization does not require an individual's consent to use their personal information if one or more of the provisions in section 17 of PIPA apply.

[para 30] The Organization argued that section 17(a) and/or section 17(i) permitted it to use the Complainant's email address to notify him of a possible exposure to COVID-19 without his consent.

[para 31] For the reasons set out below, I find that section 17(i) permitted the Organization to use the Complainant's email address without his consent for the purpose of notifying him of a possible exposure to COVID-19.

[para 32] Section 17(i) states:

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:

...

(i) the use of the information is necessary to respond to an emergency that threatens the life, health or security of an individual or the public;

...

[para 33] At page 4 of its initial submission, the Organization submitted:

Lastly, Section 17(i) of PIPA indicates that an organization can use personal information without consent where "the use of the information is necessary to respond to an emergency that threatens the life, health or security of an individual or the public". As expressed earlier, COVID-19 was a health emergency that could threaten the life and health of an individual or the public more broadly, as such we chose to use the [Complainant's] email address to ensure they were fully informed in a rapid manner of a potential exposure that could affect their health or that of those in the close proximity.

[para 34] With respect to the use of the Complainant's email to inform him of a potential exposure to COVID-19, the Organization submitted:⁵

... This occurred during the height of the pandemic that was affecting the health of the communities in which we serve. COVID was a real ongoing concern for our customers and colleagues alike. Information from public health agencies were changing rapidly relating to the severity of the disease and its ability to spread, as such acting as quickly as possible and using the information we had was of the essence to act in good faith and the protection of the health and safety of our patrons and employees.

⁵ Organization's initial submission at pages 3, 4 and 5.

...

... The use of email address to provide the customer notice of potential exposure to COVID-10 during a pandemic would represent a legitimate need to protect both our customers and employees from further exposure. The collection of and use of the email address is an effective method for communication as this was the contact information provided for the purposes of the loyalty program and being able to be communicated to for service messages, there was no less invasive means available as this would require gathering further personal information from customers or would not be effective in rapidly notifying customers to potential COVID-19 exposure. Lastly, we do not see this matter as a loss of privacy, but the use of the email to communicate a potential exposure of COVID-19 is proportional to the benefit of preventing further exposure or health complications to the customer, our employees, or other individuals. As such, it is our position that use of the customer email address for the purpose of notification of potential COVID-19 exposure is appropriate in the circumstances (of which was at the height of the pandemic).

[para 35] The Complainant did not reference or make any arguments about the application of section 17(i) in his rebuttal submission.⁶

[para 36] The term “necessary” is not defined in PIPA. Previous Orders of this Office have considered how this term should be interpreted where it appears in PIPA. In Order P2022-01 at paragraphs 37 and 38, the adjudicator stated:

[para 37] Past Orders of this Office have also discussed what is meant by the phrase “necessary” in Alberta’s Act. For example, several Orders have noted that the term “necessary” in section 7 of the Act does not mean ‘indispensable’. In Order P2012-10, the Director of Adjudication found (at para. 19):

Thus, even if the appropriate test for collecting the information is that the collection is necessary for achieving the goal, in my view, the test of necessity is met where the collection is reasonable in the sense that it provides an important and effective method for achieving the goal.

[para 38] I agree with this analysis, and will apply the above test in this case . . .

[para 37] I agree with the conclusion of the adjudicator in Order P2022-01, and the Director of Adjudication in Order P2012-10, and will apply the test set out by the Director of Adjudication in Order P2012-10 in interpreting the term “necessary” in section 17(i).

[para 38] In my view, the facts and circumstances that existed in Alberta at the time the Organization sent the COVID-19 Notification Email to the Complainant are relevant in determining whether the use of the Complainant’s email address was necessary to respond to an emergency that threatened the life, health or security of an individual or the public.

[para 39] The ability of the courts to take judicial notice of facts regarding the COVID-19 pandemic was recently considered by the Alberta Court of King’s Bench in *R. v. Church of the Vine and Fortin*, 2022 ABKB 704. At paragraphs 49 – 54, the Court stated:

⁶ Complainant’s rebuttal submission dated October 25, 2022.

[49] There was nothing improper about the Sentencing Judge’s commentary on the COVID-19 pandemic. The Sentencing Judge either had actual evidence regarding the COVID-19 virus in Alberta or took proper judicial notice of facts that were capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[50] The leading case on judicial notice is *R. v. Find*, 2001 SCC 32, [*Find*]. At paragraph 48, the Court explained:

[48] Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[51] Information generated by Statistics Canada has been recognized as a reliable source of information and has been accepted as a source of judicial notice in appropriate cases: *Warkentin Builders Movers Virden Inc v LaTrace*, 2021 ABCA 222 at para 34, see also *R v Breitreutz*, 2022 ABQB 559 at para. 29. Judicial notice of certain facts contained in government publications are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. This includes statistics regarding ICU admissions and their connection with the COVID-19 virus: *RSP v HLC*, 2021 ONSC 8362 [*RSP v HLC*] at para 57. A Court cannot take judicial notice of an expert opinion: *Find* at para 49. This includes expert scientific opinions regarding the safety and efficacy of COVID-19 vaccines found in government publications: *MM v WAK*, 2022 ONSC 4580; *RSP v JLC* at para 59; *JN v CG*, 2022 ONSC 1198; *CM v SLS*, 2022 ONCJ 206 at para 112.

[52] Judicial notice of facts regarding the COVID-19 pandemic has been the subject of numerous decisions across Canada. In May 2020, the Ontario Court of Appeal released *R v Morgan*, 2020 ONCA 279 [*Morgan*], which was the first appellate Court decision to deal with judicial notice of the COVID-19 pandemic. At para 8, the Court stated:

[8] In our view, it is not necessary to decide whether this court could take judicial notice of the effects of the COVID-19 pandemic to the extent to which the appellant would have us do that. We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

[53] This principle was adopted in this Court by Graesser J in *R v Mella*, 2021 ABQB 785 (released in September 2021) at para 40 and Whitling J in *Sembaliuk v Sembaliuk*, 2022 ABQB 62 (released in January 2022) at para 8. In *LMS v JDS*, 2020 ABQB 726 (released in October 2020) at para 18, Hollins J stated the following:

[18] I can take judicial notice of certain things about COVID, namely that it is a global pandemic and that our own public health officials have provided us with commonly-accepted precautions to avoid contracting COVID (wearing a mask, keeping distanced whenever possible, reducing contacts, washing hands). However, in my view, I cannot take judicial notice of much more than that.

[54] In *TRB v KWP*, 2021 ABQB 997 (released in December 2021) at para 12, Kubik J stated the following:

[12] Since early 2020, Canadians have been living in the midst of a global pandemic caused by the SRAS=CoV-2 virus. I take judicial notice of this fact which is so notorious and indisputable as to not require proof. I also take judicial notice of the regulatory approvals and directives issued by the various governments and agencies in Canada and Alberta. I accept that as a consequence of the pandemic, Alberta has, from time to time invoked a state of public health emergency during which the Chief Medical Officer of Health has issued directives. At the time of this decision, Alberta is in a state of public health emergency, declared on September 15, 2021.

[para 40] I find that the Supreme Court’s decision in *R. v. Find*, 2001 SCC 32 permits me to take notice of facts that are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[para 41] In this case, I take notice of the fact that on March 17, 2020, the Alberta government issued Order in Council 080/2020 (O.C. 080/2020) under the *Public Health Act*, R.S.A. 2000, c. P-37, declaring a state of public health emergency in Alberta “due to pandemic COVID-19 and the significant likelihood of pandemic influenza”.⁷

[para 42] I further take notice of the fact that O.C. 080/2020 lapsed 90 days later, on June 15, 2020.

[para 43] I also take notice of the fact that on March 27, 2020, the Chief Medical Officer of Health (CMOH) issued CMOH Order 07-2020 regarding the 2020 COVID-19 Response.⁸ In that Order, the CMOH stated, in part:

I, Dr. Deena Hinshaw, Chief Medical Officer of Health (CMOH) have initiated an investigation into the existence of COVID-19 within the Province of Alberta.

This investigation has confirmed that COVID-19 is present in Alberta and constitutes a public health emergency as a novel or highly infectious agent that poses significant risk to public health.

Under section 29(2.1) of the *Public Health Act* (the Act), I have the authority by order to prohibit a person from attending a location for any period and subject to any conditions that I consider appropriate, where I have determined that the person engaging in that activity could transmit an infectious agent. I also have the authority to take whatever other steps that are, in my opinion necessary in order to lessen the impact of the public health emergency,

⁷ Orders in Council can be found on the King’s Printer website: <https://kings-printer.alberta.ca>.

⁸ Orders of the Chief Medical Officer of Health can be found on the Alberta Open Government Portal at <https://open.alberta.ca>

Therefore, having determined that certain activities could transmit COVID-19 as an infectious agent and that certain other steps are necessary to lessen the impact of the public health emergency, I here by make the following Order:

Effective immediately, all persons in the Province of Alberta must adhere to the following restrictions and comply with the following prohibitions:

...

11. Any place of business that is still permitted to operate that offers or provides services to the public at a location that is accessible to the public must:

- (a) prevent the risk of transmission of infection to co-workers and members of the public by a worker or member of the public;
- (b) provide for a rapid response if a worker or member of the public develops symptoms of illness while at the place of business; and
- (c) maintain high levels of workplace and worker hygiene.

...

14. This Order remains in effect until rescinded by the Chief Medical Officer of Health.

[para 44] Effective June 12, 2020, CMOH Order 07-2020 was rescinded by CMOH Order 25-2020.

[para 45] These are facts which are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[para 46] The Organization sent the COVID-19 Notification Email to the Complainant on June 1, 2020, which was during the time that a state of public health emergency had been declared in Alberta pursuant to O.C. 080/2020 and during the time that CMOH Order 07-2020 was in effect.

[para 47] From the Organization's submissions, I understand that its goal or purpose in using the Complainant's email address to send him the COVID Notification Email was to rapidly notify him of a potential exposure to COVID-19. Having this information would enable the Complainant to know he had potentially come into contact with someone who had tested positive for COVID-19, and monitor for symptoms of infection and take steps to possibly reduce the spread of the virus.

[para 48] Applying the test for determining what is "necessary" set out by the Director of Adjudication in Order P2012-I0 to the case at hand, I find that the test of necessity under section 17(i) was met, as the use of the Complainant's email address was reasonable in the sense that it provided an important and effective method for achieving the goal of rapidly notifying him of a potential exposure to COVID-19.

[para 49] In light of my findings above, I conclude that section 17(i) applied and permitted the Organization to use the Complainant's email address to provide him with the COVID-19 Notification Email without his consent.

[para 50] While I have found that section 17(i) applied in this case, my conclusion is based on the specific facts and circumstances that existed at the time the Organization used the Complainant's email address to send him the COVID-19 Notification Email. Whether section 17(i) would apply at a different point in time to permit the Organization to use an individual's email address without their consent to send them a COVID-19 notification email, would depend on the facts and circumstances at that point in time.

[para 51] As I have concluded that section 17(i) permitted the Organization to use the Complainant's email address to send him the COVID-19 Notification Email without his consent, it is not necessary for me to determine whether section 17(a) of PIPA also, or in the alternative, permitted the Organization to use the Complainant's email address to send him the COVID-19 Notification Email without his consent.

4. Did the Organization use the Complainant's email [address] contrary to, or in accordance with section 16 of PIPA (use only for purposes that are reasonable and only to the extent that is reasonable for meeting the purposes for which the information is used)?

[para 52] Section 16 of PIPA states:

16(1) An organization may use personal information only for purposes that are reasonable.

(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.

[para 53] At paragraphs 34 – 38 of *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, (*Leon's*), the Alberta Court of Appeal provided the following guidance for determining whether a purpose is reasonable under PIPA (emphasis in original):

The Scheme of the Act

The Overall Purpose

[para 34] The *Personal Information Protection Act* expressly states its overall purposes. This is a key to any interpretation and application of the statute. The most important provision is s. 3:

3 The purpose of the Act is to govern the collection, use and disclosure of personal information by organization in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable. (Emphasis added)

The statute recognizes two competing values: the right to protect information, and the need to use it. When Bill 44 was discussed in Committee, the Minister of Government Services stated:

When it comes to the reasonable standards in section 2, the bill sets the standard for compliance with the act, and that standard is the reasonableness standard. This standard is important because it ensures that the act is flexible for small and medium-sized businesses. If businesses act reasonably, they have no problem with complying with the act. (*Hansard*, November 25, 2003)

The statute does not give predominance to either of the two competing values, and any interpretation which holds that one must always prevail over the other is likely to be unreasonable. A balancing is called for. That balancing is not fully implemented by the other provisions of the *Act*. The balance called for by s. 3 must also be maintained by the Commissioner when assessing what is “reasonable”.

[para 35] The issue is not whether privacy rights are important. They are, as demonstrated by the cases discussed by Conrad J.A. at paras. 102-114. The Legislature has deemed them to be important by passing the *Act*. But their admitted importance does not mean that privacy rights must predominate over all other societal needs, values and interests. Because the customer’s interests are important does not mean the retailer’s are not. Our society is complex and increasingly information based, and many organizations, businesses and individuals must use personal information for legitimate reasons on a daily basis. An unreasonable curtailment of the ability to use that information imposes a financial and societal burden which is recognized by s. 3 of the *Act*. The *Act* recognizes that a balancing of the various interests is called for, and it is inconsistent with any suggestion that privacy rights should always predominate over competing values. The statute cannot reasonably be interpreted in a way that prevents reasonable uses of personal information.

[para 36] The *Act* makes frequent use of the concepts of “reasonableness” and “consent”.

Reasonableness

[para 37] A number of provisions in the statute require that information be used, or the right to use information be exercised in a “reasonable” manner. There is an overriding provision in s. 5(5) that: “In meeting its responsibilities under this Act, an organization must act in a reasonable manner.” Section 11(1) confirms that: “An organization may collect personal information only for purposes that are reasonable.” Sections 16 and 19 apply the same test to the use and disclosure of information.

[para 38] The statute provides a definition of what is “reasonable”:

2 Where in this Act anything or any matter

- (a) is described, characterized or referred to as reasonable or unreasonable, or
- (b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

The standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

This section essentially embraces the common law concept of the “reasonable person”, and provides that the conduct of organizations using personal information must be scrutinized accordingly. The hypothetical reasonable person would recognize both of the values set out in s. 3: the rights of individuals to a reasonable level of privacy, and the needs of organizations to make reasonable use of information in the conduct of their activities.

[para 54] Additionally, at paragraph 57 of *Leon’s*, the Court of Appeal stated:

[57] As previously noted (*supra*, paras. 34-35 and 39), the reasonableness of the adjudicator’s decision is undermined by her failure to recognize that the appellant needed to show only that its policies were “reasonable”, not that they were the “best” or “least intrusive” approaches. Sections 3 and 11 do not create any test of “paramountcy”; the test is whether the use being made of the information is “reasonably necessary”. That standard does not require the organization to defer in all instances to the interests of individual privacy. The respondent is not empowered to direct an organization to change the way it does business, just because the respondent thinks he has identified a better way. So long as the business is being conducted reasonably, it does not matter that there might also be other reasonable ways of conducting the business.

[para 55] Taking into account the guidance provided by the Court of Appeal in *Leon’s*, I find that in the particular circumstances of this case, given what was known, or, as it was so early in the pandemic, what was not known about COVID-19, the Organization’s purpose in using the Complainant’s email address to notify him as quickly as possible that he may have potentially been exposed to COVID-19 at its Shoppers Drug Mart Jasper Avenue location was reasonable under section 16(1).

[para 56] I further find that the Organization only used the Complainant’s email address to the extent that was reasonable for meeting the purpose of notifying him as quickly as possible that he may have potentially been exposed to COVID-19.

IV. ORDER

[para 57] I make this Order under section 52 of PIPA.

[para 58] I find that section 17(i) of PIPA permitted the Organization to use the Complainant’s email address without his consent to send him the COVID-19 Notification Email.

[para 59] I find that the Organization used the Complainant's email address in compliance with section 16 of PIPA.

Carmen Mann
Adjudicator
/bah