ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2007-001

January 21, 2008

DR. BARRY LYCKA

Case File Number H1284

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

Summary: The patient Complainant went back to see her doctor, Dr. Barry Lycka ("Dr. L." or "Custodian"), for treatment of skin cancer at Dr. L.'s physician office clinic ("Clinic"). At the Clinic, the Complainant completed a new Patient History Form, where she opted out of the mailing list ("Database"). The Database was updated from information on the Patient History Form. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Canadian Skin Cancer Foundation ("Foundation").

Shortly after the Clinic visit, the Complainant began to receive "solicitations" from the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), Corona and the Foundation. The Complainant alleged that Dr. L. contravened the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") by collecting, using and disclosing her health information for purposes of marketing and soliciting for fundraising. For the first time, the issues of whether a custodian is allowed to collect, use or disclose health information for purposes of marketing and soliciting for fundraising under HIA, are considered in an Order.

The Inquiry was held in conjunction with two other inquiries for Case File Numbers P0493 and P0494, which resulted in Order P2007-006 and Order P2007-007 that involve the same Complainant and two other respondents (Corona and the Foundation) under the *Personal Information Protection Act,* S.A. 2003, c. P-6.5 ("PIPA").

The Custodian at this inquiry is involved in two other inquiries for Case File Numbers H1325 and H1331, which resulted in Order H2007-003 and Order H2007-004. One of the other respondents in the concurrent inquiries (Foundation) is involved in inquiries for Case File Numbers P0481,

P0490 and P0489, which resulted in Orders P2007-008, P2007-009 and P2007-012. The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011. There are a total of nine inquiries pertaining to the Database.

The Adjudicator found that:

- Neither party has the burden of proof for the definitional issues (custodian, collect, use, disclose, individually identifying, health information);

- The Custodian has the burden of proving that any collection was in accordance with section 20 and section 18 of HIA;

- The Custodian has the burden of proving that any use was in accordance with section 27 and section 25 of HIA;

- The Custodian has the burden of proving that any disclosure was in accordance with section 34, section 35 or section 36, whichever applies, and with section 31 of HIA;

- The "Custodian" "collected", "used" and "disclosed" "individually identifying" "health information", as these terms are defined in HIA;

- The Custodian did not have authority to collect health information for purposes of marketing and soliciting for fundraising under section 20 of HIA (collection permitted in specified circumstances), and more particularly, did not have authority to collect the health information under section 20(b) of HIA;

- The Custodian collected health information for purposes of marketing and soliciting for fundraising in contravention of section 18 of HIA (no collection except in accordance with HIA);

- The Custodian did not have authority to use health information for purposes of marketing and soliciting for fundraising under section 27 of HIA (use permitted in specified circumstances), and more particularly, did not have authority to use the health information under section 27(1)(a) of HIA;

- The Custodian used health information for purposes of marketing and soliciting for fundraising in contravention of section 25 of HIA (no use except in accordance with HIA);

- The Custodian did not have authority to disclose health information for purposes of marketing and soliciting for fundraising under section 34 of HIA (disclosure permitted with consent), and more particularly, did not have authority to disclose the health information under section 34(2) of HIA;

- The Custodian did not have authority to disclose any "diagnostic, treatment and care information" for purposes of marketing and soliciting for fundraising under section 35 of HIA (disclosure permitted without consent in specified circumstances), and more particularly, did not have authority to disclose the health information under section 35(1)(a) or section 35(1)(b) of HIA;

- The Custodian did not have authority to disclose any "registration information" for purposes of marketing and soliciting for fundraising under section 36 of HIA (disclosure permitted

without consent in specified circumstances), and more particularly, did not have authority to disclose the health information under section 36(a) of HIA; and

- The Custodian disclosed health information for purposes of marketing and soliciting for fundraising in contravention of section 31 of HIA (no disclosure except in accordance with HIA).

The Adjudicator ordered the Custodian to:

- Stop collecting, using and disclosing health information for purposes of marketing and soliciting for fundraising in contravention of HIA; and

- Submit a privacy impact assessment for the health information in the Database.

Bottom Line: HIA prohibits a custodian from collecting, using or disclosing health information, except in accordance with HIA. Consent does not provide authority for a custodian to collect or use health information. The purposes for which a custodian can collect, use or disclose health information without consent are prescribed in HIA, such as the provision of health services. A custodian is prohibited from collecting or using health information for a purpose that is not a prescribed purpose under HIA, such as marketing and soliciting for fundraising. In contrast, consent authorizes a custodian to disclose health information for any purpose, but the consent must fulfill the criteria in section 34(2) of HIA.

Authorities Cited: Alberta Health and Wellness, *Health Information Act: Guidelines and Practices Manual – Alberta's Health Information Act,* Alberta Health and Wellness, 2006; Canadian Medical Association, *CMA Code of Ethics*, 2004; Canadian Medical Association, *CMA Health Information Privacy Code*, August 15, 1998; College of Physicians and Surgeons of Alberta, *Data Stewardship Framework*, Version 1.2, Medical Informatics Committee of the CPSA, December 1, 2006; College of Physicians and Surgeons of Alberta*, Transition to Electronic Medical Records (EMR)*, CPSA Guideline, September 2004; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Markham Ontario: Butterworths, 2002.

Cases Cited: *Stubicar v. Alberta (Office of the Information and Privacy Commissioner),* 2007 ABQB 480, August 13, 2007 (AB QB); Application to re-open dismissed by Justice Hawco. Appeal pending, on other grounds).

Orders Cited: AB FOIP: Investigation Report: 2000-IR-002; **AB: HIA:** Orders: H2007-006, H2007-004, H2007-003, H2006-003 (Note: judicial review on other grounds, as above), H2006-002, F2006-021 & H2006-001, H2005-007, H2005-006, F2005-017 & H2005-001, H2004-004, H2004-002, F2004-005 & H2004-001; **AB PIPA:** P2007-012, P2007-011, P2007-009, P2007-008, P2007-007, P2007-006; **ONT:** Case Summary: HC-050001-1.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 34(1)(f), 39(1)(b), 39(2), 39(3),40(1)(d), 40(2)**;** *Health Information Act,* R.S.A. 2000, c. H-5, ss. 1(1), 1(1)(d), 1(1)(f), 1(1)(f)(ix), 1(1)(i), 1(1)(i)(i), 1(1)(i)(ii), 1(1)(k), 1(1)(m), 1(1)(m)(i), 1(1)(n), 1(1)(p), 1(1)(u), 1(1)(w), 2, 2(a), 2(b), 2(c), 2(f), 18, 20, 20(a), 20(b), 25, 27, 27(1), 27(1)(a), 27(2), 28, 31, 34, 34(1), 34(2), 34(3), 35, 35(1), 35(1)(a), 35(1)(a.1)-(i), 35(1)(b), 35(1)(k), 35(1)(l)-(p), 35(1)(q), 35(1)(r)-(s), 36, 36(a), 79, 80, 80(3)(a), 80(3)(e), 107(2)(f) and Part 1, Part 3, Part 4, Part 5, Part 6, Part 7 and Part 8; *Health Information Regulation*, A.R. 70/2001, ss. 3(a)(i), 3(a)(v), 3(b)(i), 8(6), 8(7); *Health Information Protection Act*, S.S. 1999, c. H-0.021, ss. 24, 26, 27, 28, 29; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10; *Personal Health Information Protection Act, 2004*, S.O 2004, c. 3, Schedule A, ss. 2, 32(1), 33; *Ontario Regulation,* 329/04, ss. 10(1), 10(2), 10(3), 10(4); *Personal Information Protection Act,* S.A. 2003, c. P-

6.5; *The Personal Health Information Act*, S.M. 1997, c. 51 or C.C.S.M. c. P33.5, ss. 21, 22(1)(2), 27, 60(e).

I. BACKGROUND

[para 1] The patient Complainant went back to see her doctor, Dr. Barry Lycka ("Dr. L." or "Custodian"), for treatment of skin cancer at Dr. L.'s physician office clinic ("Clinic"). At the Clinic, the Complainant completed a Patient History Form ("Form"), where she opted out of the mailing list ("Database"). The information on the Form is used to update the Database.

[para 2] Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Canadian Skin Cancer Foundation ("Foundation"). Shortly after the Clinic visit, the Complainant began to receive "solicitations" from the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), Corona and the Foundation. The Complainant alleged that Dr. L. contravened the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") by collecting, using and disclosing her health information for purposes of marketing and soliciting for fundraising.

[para 3] In her initial written submission, the Complainant describes the previous complaint she made to the Commissioner's Office about Dr. L., as follows:

> This is the second time I contacted the Office of the Information and Privacy Commissioner about this physician's practices. The first investigation determined this Edmonton physician was in fact using patient information for the purposes of solicitation of donations and business. The result of that investigation was that he was to include on his 'new patient' forms, a clause to 'opt out' of being solicited. … The problem is that Dr. Lycka continues to abuse his access to privileged and private patient information *in spite* of having included a statement on the revamped patient form allowing individuals to 'opt out' of receiving such solicitations.

[para 4] The current complaint was set down for a written inquiry ("Inquiry"). The Information and Privacy Commissioner, Frank Work, Q. C. ("Commissioner") delegated me to hear the Inquiry. At the Inquiry, the parties provided written initial submissions and written rebuttal submissions that were exchanged between the parties. The Complainant requested anonymity, so her name was removed before submissions were exchanged. The Complainant requested that information she previously provided to the Office for purposes of making her complaint, be considered as part of her written initial submission at the Inquiry.

[para 5] The Inquiry was held in conjunction with inquiries for Case File Numbers P0493 and P0494, which resulted in Order P2007-006 and Order P2007-007 that involve the same Complainant and two other respondents (Corona and the Foundation) under the *Personal Information Protection Act,* S.A. 2003, c. P-6.5 ("PIPA"). The parties provided the same written initial submissions and written rebuttal submissions for the three concurrent inquiries. The Custodian at the Inquiry is involved in two other inquiries for

Case File Numbers H1325 and H1331, which resulted in Order H2007-003 and Order H2007-004.

[para 6] One of the respondents in the concurrent inquiries (the Foundation) is involved in inquiries for Case File Numbers P0481, P0490 and P0489, which resulted in Orders P2007-008, P2007-009 and P2007-012. The respondents provided the same written initial submission for seven of the inquiries. The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011. There are a total of nine inquiries pertaining to the Database.

II. RECORDS/INFORMATION

[para 7] As this is a complaint, there are no records at issue in the usual sense. The Inquiry pertains to the authority of Dr. L. to collect, use and disclose health information for purposes of marketing and soliciting for fundraising. Dr. L. says the information in the Database consists of name, telephone number, mailing address, gender and services requested.

III. INQUIRY ISSUES

[para 8] The issues in the Notice of Inquiry are:

> ISSUE A: Did the "Custodian" "collect", "use" or "disclose" "individually identifying" "health information", as these terms are defined in HIA?

[para 9] If I find that the answer to the above question is "yes", I will decide the following issues:

> ISSUE B: Did the Custodian have authority to collect the health information under section 20 of HIA (collection permitted in specified circumstances)?
>
> ISSUE C: Did the Custodian collect the health information in contravention of, or in compliance with, section 18 of HIA (no collection except in accordance with HIA)?
>
> ISSUE D: Did the Custodian have authority to use the health information under section 27 of HIA (use permitted in specified circumstances)?
>
> ISSUE E: Did the Custodian use the health information in contravention of, or in compliance with, section 25 of HIA (no use except in accordance with HIA)?
>
> ISSUE F: Did the Custodian have authority to disclose the health information under section 34 of HIA (disclosure permitted with consent)?

ISSUE G: Did the Custodian have authority to disclose any “diagnostic, treatment and care information” under section 35 of HIA (disclosure permitted without consent in specified circumstances)?

ISSUE H: Did the Custodian have authority to disclose any “registration information” under section 36 of HIA (disclosure permitted without consent in specified circumstances)?

ISSUE I: Did the Custodian disclose the health information in contravention of, or in compliance with, section 31 of HIA (no disclosure except in accordance with HIA)?

ISSUE J: With respect to Issue A, should neither party have the burden of proof?

ISSUE K: With respect to Issues B and C, should the Custodian have the burden of proving that any collection was in accordance with section 20 and section 18 of HIA?

ISSUE L: With respect to Issues D and E, should the Custodian have the burden of proving that any use was in accordance with section 27 and section 25 of HIA?

ISSUE M: With respect to Issues F, G, H and I, should the Custodian have the burden of proving that any disclosure was in accordance with section 34, section 35 or section 36, whichever applies, and with section 31 of HIA?

[para 10] The Inquiry pertains only to collection, use and disclosure of health information for purposes of marketing and soliciting for fundraising. The corollary is that collection, use and disclosure of health information for other purposes, such as for the provision of health services, is *not* at issue. As the parties submitted the same written initial and written rebuttal submissions for the three concurrent inquiries, this Order will provide the more complete version of the facts, evidence and argument.

IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

The Facts

The patient complainant

[para 11] In her written submissions, the Complainant says that in early 2006 she returned to see Dr. L. at the Clinic for a review of her skin cancer progression. She says that she completed the new Form during that physician visit at the Clinic, as the Form had been updated. The Complainant says she opted out of the mailing list on the Form, and additionally, she verbally told the Clinic reception staff that she did *not* want to be on the mailing list.

[para 12] The Complainant says that within a month after her visit to the Clinic, she began to receive mailings from Dr. L.'s office and over time she received "solicitations" from the Foundation and Corona. The Complainant says that she telephoned the Clinic about the mailings and reminded the staff about her "opt-out" on the Form. She says the Clinic staff assured her they would update her file and that she would no longer receive the mailings. Nevertheless, the Complainant continued to receive "solicitations".

The physician custodian

[para 13] Dr. L.'s written submissions describe the development of the Database and the evolution of the relationships among Dr. L., the Clinic, the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), the Foundation, Corona and Endermologie Centre Corporation ("Endermologie").

[para 14] Dr. L. says that the Database was established in 2000, but "major changes" were subsequently made to the Database. In 2004, the new Form was developed, which patients completed when they returned to the Clinic. Dr. L. says the Database was updated, which included information from the Form, about 18 months before the complaints arose that gave rise to the Inquiry.

[para 15] Dr. L. says the primary purpose of the Database is "keeping track of all the patients seen in the Clinic". The secondary purpose is to "facilitate information distribution" to patients and non-patients. Dr. L. says that to begin with the Database only included Clinic patients. However, over time the Database expanded to include non-patients such as Corona clients, Corona seminar attendees, Foundation donors and other individuals. Dr. L. shares the Database with the Foundation and Corona.

The Evidence

The patient complainant

[para 16] When she made her complaint to the Office, the Complainant provided the following three packages:

- *First package (Professional Corporation)* – This four-page package from the Professional Corporation to the Complainant, consists of a covering letter dated March 2006 and a three-page attachment that begins, "Dear Friend". The letter is, "because you have visited Dr. Lycka as a patient in the last two years …That means in the last two years Dr. Lycka has helped you in some way with a health or cosmetic problem."

- *Second package (Corona)* - This seven-page package from Corona consists of a covering letter, a newsletter, a form and a flyer for services that include a medi-spa, which was addressed to the Complainant by first name and middle initial.

- *Third package* - This five-page package consists of a four-page brochure with a registration form that the Complainant received from a third party. The brochure is for a "MSI (Multiple Streams of Income) 2006 Chicago" conference on June 2-4, 2006, which is a "seminar for your financial well being" where "Dr. Barry Lycka will teach you about how to make money from absentee businesses like medi-spas."

The physician custodian

[para 17] Dr. L.'s initial written submission contains ten tabs and a "Table of Authorities". The first eight tabs pertain to evidence. The title for Tab 8 in the Table of Authorities is, "Letters re: Party for Dr. Lycka". However, two letters by that description are located under Tab 9, which is entitled "Investigation Report 2000-IR-002". Because it appears this was the intent, I will refer to the two letters under Tab 9 as if all three letters were located under Tab 8. Tabs 1 to 8 are as follows:

- *Tab 1: Alberta Corporation Registration Information (Endermologie & Corona)* - Endermologie was registered as an Alberta Corporation on November 24, 2004. The Director's last name is Bernier-Lycka and the voting shareholders are Lycka Capital Corp. Corona Rejuvenation Center & Spa was registered on March 7, 2005, as the trade name for Endermologie. Corona is a medical spa business.

- *Tab 2: Alberta Corporation Registration Information (Foundation)* - The Canadian Skin Cancer Foundation was registered as an Alberta Society on October 31, 2003. Dr. Barry Lycka is the President and a Director of the Foundation.

- *Tab 3: Canadian Skin Cancer Foundation Registered Objects (Foundation)* - This Special Resolution created new objects for the Foundation on December 9, 2004, which are to prevent skin cancer by providing public and physician education on early skin cancer detection, awareness and prevention.

- *Tab 4: Question 40, Patient History Form (Dr. L./Clinic)* - This two-page Form is entitled, "Patient History". The top part has blank spaces for first and last name, age, date of birth, weight, height, present family doctor, doctor's city and telephone number, date of last visit, patient address, occupation, place of employment, patient home phone number, work phone number, e-mail address, next of kin, relationship and next of kin phone number.

- The next part of the Form has blank spaces to answer questions about present general health, visits to the family doctor, allergies, serious illnesses requiring hospitalization and operations. The bottom of the back of the Form has blank spaces for a list of medications and a 'patient' signature. The balance of the Form consists of 40 questions, which are preceded by this statement:

  > AS PART OF YOUR EVALUATION, PLEASE ANSWER THE FOLLOWING QUESTIONS ABOUT YOUR PAST MEDICAL HISTORY. PLEASE ANSWER BY PLACING A "[CHECK MARK]" IN THE APPROPRIATE BOX.

- The first 39 questions in the Form pertain to an individual's medical condition and state of health. For example the first question is, "Do you have 'low blood' or anemia?" The last of the 40 questions on the Form is:

  40. Would you like to be added on too [sic] our mailing list? YES NO

- *Tab 5: Consent Form (Foundation)* - This one-page form is addressed, "Dear Valued Patient". Within the form, Barry S. Lycka, MD, FRCPC, announces the "formation of a new society that I am intimately involved with". The form describes the society as a non profit organization called the Canadian Skin Cancer Foundation.

- *Tab 6: Corona Consultation Booking Form (Corona)* - This one-page "Consultation Booking Form" refers to an information seminar and has spaces for name, address, home phone, alternate phone and email address. Individuals are to complete the form for a "complimentary consult appointment" and check off the box to receive the Corona Newsletter.

- *Tab 7: Chart Pulling Procedures (Dr. L./Clinic)* - These two pages are procedures that pertain to the opt out for patient charts at the Clinic. The "verifying" procedure includes: "Check patient history sheet to see if mailouts reads "NO"; **Confirm checkmarks by clinic for receiving mail … NOTE: If there is no checkmark (by default) for BLPC mail, and the patient does NOT want mail, click to check, click again to uncheck. This will now be updated to show date confirmed and user name."

- *Tab 8: Letters re: Party for Dr. Lycka*

  - *First letter (Dr. L./Professional Corporation)* – This four-page package is almost identical to the March 2006 letter in the Complainant's submission, but this letter is dated April 2006 and the second paragraph reads, "I am writing to you because of your association in one way or another with Dr. Lycka. All of the many patients, colleagues, family members and friends are very aware of the health and cosmetic problems that Dr. Lycka has helped so many people with for over twenty years in Edmonton." The letter is signed by the Controller of the Professional Corporation.

  - *Second letter (Dr. L./Professional Corporation* – This undated single page letter is addressed by first name, "[D]isappointed and saddened am I". The letter says, "A few weeks ago we sent you an invitation to what will be the social event of 2006. We didn't hear from you so we wrote you again. Still no response. So I'm writing again to make sure you still have a heart beat." This letter is signed by the same individual as the first letter.

  - *Third letter (Foundation)* - This June 2006 single page letter is addressed by first name. The letter refers to the above described undated letter and to Dr. Lycka's birthday party on June 26th and says, "We have received some phone calls from a few of you that were offended by the content in that letter.

> Please accept our deepest apologies as we had no intention of offending anyone." This letter is signed by the Office Manager of the Foundation.

The Arguments

[para 18] The Complainant says that Dr. L. contravened HIA by collecting, using and disclosing her health information for purposes of marketing and soliciting for fundraising. The Complainant takes the position that she opted out of the mailing list in the Database and did not consent to her information being collected, used or disclosed for purposes other than the provision of health services.

[para 19] However, Dr. L. takes the position that HIA was not contravened. Dr. L. says the Clinic patients with information in the Database consented to the collection, use and disclosure of health information for purposes of marketing and soliciting for fundraising, and therefore, any collection, use or disclosure is authorized under HIA. In support of his position, Dr. L. provides two Investigation Reports issued by this Office.

V. DISCUSSION OF PRELIMINARY ISSUES

Anonymity

[para 20] The usual procedure at an inquiry is that the parties disclose their identities to each other. However, there are exceptions to the general rule. An exception arises when one of the parties has a compelling reason why his or her name should not be disclosed during the process of an inquiry.

[para 21] The Complainant requested anonymity in these proceedings on the basis that she is currently Dr. L.'s patient. In her initial written submission, she says:

> I cannot take forward my concern to Dr. Lycka in person as I feel at a disadvantage on several fronts. First, he may again operate on me to remove cancerous tissue and I do not feel I am able to enter into a disagreeable 'meeting of the minds' about this issue. Consider my position – would you want to go under the knife of someone you had a disagreement with?! My health is literally, in his hands.

[para 22] Dr. L.'s response is as follows:

> While we understand the perception the patient may have that should she complain about being on the mailing list, her health care may be in jeopardy, Dr. Lycka emphatically denies such is the case.

[para 23] I accept the argument that it is the Complainant's perception that disclosing her identity to Dr. L. in these proceedings could "disadvantage" her in terms of obtaining health services. I accept the Complainant's concern that disclosing her identity in these proceedings could negatively affect her ongoing relationship with Dr. L. and access to medical treatment. In the Complainant's own words, "My health is

literally, in his hands." I take the same approach to this issue as in Orders P2007-006 and P2007-007, which pertain to the same Complainant. In my view, the Complainant has provided a compelling reason for anonymity in these proceedings.

Non-inquiry issue

[para 24] The second letter under Tab 8 in Dr. L.'s initial submission is the letter that begins, "[D]isappointed and saddened am I". The letter says, "A few weeks ago we sent you an invitation to what will be the social event of 2006. We didn't hear from you so we wrote you again. Still no response. So I'm writing again to make sure you still have a heart beat."

[para 25] Dr. L. raises the following issue:

> The Complainants found the content of the letter to be insulting and in poor taste. That is not relevant to this inquiry. … Just because a few of the recipients did not like, or were offended by the content of the letter does not mean there was a breach of either act.

[para 26] The Complainant responds, as follows:

> I have not submitted a complaint to OIPC simply because I did not like or was offended by the content of the fundraising letter[s].

[para 27] I accept the argument of the parties that whether the letter(s) are "insulting and in poor taste" is not relevant to the HIA issues before the Inquiry. My jurisdiction at the Inquiry and the scope of this Order are restricted to the collection, use and disclosure issues under HIA. Section 80 requires me to issue an Order that relates to the Inquiry issues, such as requiring a custodian to perform a duty imposed by HIA such as preparing a privacy impact assessment (section 80(3)(a)) and requiring a custodian to stop collecting, using or disclosing health information in contravention of HIA (section 80(3)(e)).

VI. DISCUSSION OF INQUIRY ISSUES

[para 28] This Order will first address the matters pertaining to burden of proof set out in Issues J, K, L and M, then the definitional matters in Issue A and then the substantive matters in Issues B through I. The burdens of proof that were proposed in the Notice of Inquiry, are as follows:

- With respect to Issue A, neither party will have the burden of proof.
- With respect to Issues B and C, the Custodian will have the burden of proving that any collection was in accordance with section 20 and section 18 of HIA.

- With respect to Issues D and E, the Custodian will have the burden of proving that any use was in accordance with section 27 and section 25 of HIA.

- With respect to Issues F, G, H and I, the Custodian will have the burden of proving that disclosure was in accordance with section 34, section 35 or section 36, whichever applies, and with section 31 of HIA.

ISSUE J: WITH RESPECT TO ISSUE A, SHOULD NEITHER PARTY HAVE THE BURDEN OF PROOF?

[para 29] Section 79 is the only provision in HIA that pertains to burden of proof. However, section 79 of HIA is not of assistance at the Inquiry, as that provision applies only to requests for access rather than to breaches of privacy. For example, HIA is silent about the burden of proof for the alleged breaches of privacy that are at issue at the Inquiry.

[para 30] The parties were invited to make representations about the burdens of proof that were proposed in the Notice of Inquiry. Neither party expressly objected to the burdens of proof as proposed in the Notice of Inquiry. The Complainant did not make a submission on burdens of proof. Dr. L.'s initial written submission makes an indirect comment about the proposed burdens of proof, which says:

> [T]he Respondents submit they have met the burden of proof by providing evidence of steps taken to obtain consent from individuals to add their names to the database/mailing list so they can receive further information from the Respondents.

[para 31] The appropriate allocation of burden of proof has been canvassed in other situations where HIA is silent, most recently in Order H2007-006 (paras 34-36). In Order H2006-003 (Note: Judicial review on other grounds; Order upheld by Justice Hawco in *Stubicar v. Alberta (Office of the Information and Privacy Commissioner),* 2007 ABQB 480, August 13, 2007 (AB QB); Application to re-open dismissed by Justice Hawco. Appeal pending, on other grounds), I said:

> HIA is silent regarding which party has the burden of proof under section 10(a) of the Act. When HIA is silent, a case-by-case determination must be made about which party has the burden of proof. Orders issued under other provisions in HIA where the burden of proof is also silent say the party that is in the best position to address the matter at issue has the burden of proof (Orders: H2005-007, paras 53, 66-67; H2005-006, paras 45-46, 72-73; H2004-004, paras 12, 21) (Order H2006-003, para 8).

[para 32] The test adopted for allocation of burden of proof when HIA is silent, is that the party who is in the best position to address the matters at issue has the burden of proof. Issue A pertains to definitional issues. In my view, applying the above test for establishing burden of proof in the circumstances of this case means that neither party is in the better position to address these matters. Therefore, I find that neither party has the burden of proof for Issue A.

ISSUE K: WITH RESPECT TO ISSUES B AND C, SHOULD THE CUSTODIAN HAVE THE BURDEN OF PROVING THAT ANY COLLECTION WAS IN ACCORDANCE WITH SECTION 20 AND SECTION 18 OF HIA?

[para 33] Issues B and C are the substantive issues about whether Dr. L. collected the Complainant's health information in the Database in contravention of section 20 and section 18 of HIA. The Complainant raised the issue, and therefore, is in the better position to show that her health information was collected. Dr. L. is the party with the Database and with access to the individuals and internal processes at the Clinic, so is in the better position to address the substantive matters.

[para 34] In my view, applying the above test for allocating the burden of proof in this case means that the Complainant has the low-level initial burden to show that her health information was collected. If the Complainant discharges this initial burden, then the burden shifts to Dr. L., as Dr. L. is in the better position to address the substantive matters about whether any collection is in accordance with section 20 and section 18 of HIA. Therefore, I find that the Complainant has the initial burden and Dr. L. has the further burden of proof for the substantive matters under Issues B and C, to show that any collection was in accordance with section 20 and section 18 of HIA.

ISSUE L: WITH RESPECT TO ISSUES D AND E, SHOULD THE CUSTODIAN HAVE THE BURDEN OF PROVING THAT ANY USE WAS IN ACCORDANCE WITH SECTION 27 AND SECTION 25 OF HIA?

[para 35] In my view, applying the above test for assigning the burden of proof means that the Complainant has the low-level initial burden to show that her health information was used. If the Complainant discharges this initial burden, then the burden shifts to Dr. L., as Dr. L. is in the better position to address the substantive matters about whether any use is in accordance with section 27 and section 25 of HIA. Therefore, I find that the Complainant has the initial burden and Dr. L. has the further burden of proof for the substantive matters under Issues D and E, to show that any use was in accordance with section 27 and section 25 of HIA.

ISSUE M: WITH RESPECT TO ISSUES F, G, H AND I, SHOULD THE CUSTODIAN HAVE THE BURDEN OF PROVING THAT DISCLOSURE WAS IN ACCORDANCE WITH SECTION 34, SECTION 35 OR SECTION 36, WHICHEVER APPLIES, AND WITH SECTION 31 OF HIA?

[para 36] In my view, applying the above test for assigning the burden of proof means that the Complainant has the low-level initial burden to show that her health information was disclosed. If the Complainant discharges this initial burden, then the burden shifts to Dr. L., as Dr. L. is in the better position to address the substantive matters about whether any disclosure is in accordance with sections 34, 35, 36 and 31 of HIA. Therefore, I find that the Complainant has the initial burden and Dr. L. has the

further burden of proof for the substantive matters under Issues F, G, H and I, to show that any disclosure was in accordance with sections 34, 35, 36 and 31 of HIA.

ISSUE A: DID THE "CUSTODIAN" "COLLECT", "USE" OR "DISCLOSE" "INDIVIDUALLY IDENTIFYING" "HEALTH INFORMATION" OF THE COMPLAINANT AS THESE TERMS ARE DEFINED IN HIA?

[para 37] Issue A includes six sub issues that are whether there is a "custodian", a "collection", a "use", a "disclosure" and "individually identifying" "health information". I will begin by considering whether there is "individually identifying" "health information" and then consider whether there is a "custodian". I will address "collect", "use" and "disclose" with the substantive issues pertaining to those terms.

Individually Identifying

[para 38] Section 1(1) of HIA, under the heading of "Interpretation", defines some of the terms used in HIA. Section 1(1)(p) defines "individually identifying" as follows:

> 1(1)(p) "individually identifying", when used to describe health information, means that the identity of the individual who is the subject of the information can be readily ascertained from the information.

[para 39] The Complainant did not explicitly address the meaning of the term, "individually identifying". However, throughout her submissions, the Complainant described concerns about her name, phone number and mailing address, for example:

> Dr. Lycka does *not and never has had* my express and written permission to collect, share, lease, rent, distribute or otherwise utilize my contact information, including my name, phone number and mailing address.

[para 40] Dr. L. said the Database contains names, phone numbers, addresses, gender and services requested for individuals including Clinic patients, as follows:

> [T]here have been changes made to the manner and type of information collected over the years including the following: Some basic demographic information was added. Information such as gender and services requested … The Respondents concede the mailing list derived from the database contains "individually identifying" information as defined under section 1(p) [sic] of HIA.

[para 41] Information is "individually identifying" under section 1(1)(p) of HIA when the identity of the individual who is the subject of the information can be "readily ascertained" from the information. In my view, name alone means that the identity of the individual can be readily ascertained from the information. When an individual's name is combined with identifying information such as telephone number, mailing address and gender, the identity of an individual can be even more readily ascertained. The parties do not dispute that the information is "individually identifying".

[para 42] I accept Dr. L.'s submission that the information in the Database that consists of name, telephone number, mailing address, gender and services requested, is "individually identifying", as the identity of the individual who is the subject of the information can be readily ascertained from the information. Therefore, I find that the information in the Database is "individually identifying", under section 1(1)(p) of HIA.

Health Information

[para 43] The relevant parts of the definitions pertaining to "health information" are as follows:

> 1(1)(i) "diagnostic, treatment and care information" means information about any of the following:
>
> (i) the physical and mental health of an individual;
>
> (ii) a health service provided to an individual;
>
> and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record.
>
> 1(1)(k) "health information" means any or all of the following:
>
> (i) diagnostic, treatment and care information;
>
> (ii) health services provider information.
>
> 1(1)(u) "registration information" means information relating to an individual that falls within the following general categories and is more specifically described in the regulations:
>
> (i) demographic information, including the individual's personal health number;
>
> (ii) location information;
>
> (iii) telecommunications information;
>
> (iv) residency information; …
>
> but does not include information that is not written, photographed, recorded or stored in some manner in a record.

[para 44] The *Health Information Regulation*, A.R. 70/2001 ("HIA Reg") says that "registration information" includes:

> 3 The following information, where applicable, relating to an individual is registration information for the purposes of section 1(1)(u) of the Act:

(a) demographic information, including the following:

(i) name, in any form;

(v) gender;

(b) location, residency and telecommunications information, including the following:

(i) home, business and mailing addresses, electronic address and telecommunications numbers.

[para 45] The Complainant did not address whether the information falls within the definition of "health information" under HIA. However, the Complainant says that she completed the Form and provided information including name and address, to Dr. L. for the sole purpose of obtaining medical treatment for skin cancer, as follows:

> My name, mailing address, phone numbers, sex and services requested are stored in the database. However, the only service I ever requested was medical treatment for skin cancer.

[para 46] Dr. L. says the Database does not include "medical or diagnostic information", as follows:

> Information such as gender and services requested, but at no time has any medical or diagnostic information ever been collected in the database. … In so much as the names and addresses were listed in the database and used in mailing, and such information could be construed as registration information as set out in s. 3 of the *Health Information Regulation, 70/2001*, the Respondents concede "health information", including "registration information" was used. … Health information is defined very broadly under the HIA.

Registration information

[para 47] HIA defines "registration information" to include an individual's name, telephone number, mailing address and gender (HIA section 1(1)(u) and HIA Reg section 3(a)(i), section 3(a)(v) and section 3(b)(i)). I find that telephone number and gender also fall within the definition of "registration information" under HIA. Therefore, I find that name, telephone number, mailing address and gender are all "registration information", as defined in section 1(1)(u) of HIA and section 3(a)(i), section 3(a)(v) and section 3(b)(i) of the HIA Reg.

Diagnostic, treatment and care information

[para 48] The Database contains what Dr. L. describes as "services requested". It is not clear whether this includes information about the physical health of an individual or about the provision of a health service to an individual. Dr. L. says there is no "medical

or diagnostic information" in the Database, but also concedes that health information is "defined very broadly" under HIA.

[para 49] In my view, Dr. L. was providing a "health service" as defined in section 1(1)(m) of HIA, because Dr. L. was treating the Complainant for skin cancer. The Form contains information about the physical health of an individual under section 1(1)(i)(i), information about a health service provided to an individual under section 1(1)(i)(ii) and any other information about an individual that is collected when a health service is provided to the individual under section 1(1)(i) of HIA.

[para 50] Insofar as the "services requested" data pertains to the physical health of an individual, a health service provided to an individual or any other information about an individual that is collected when a health service is provided to the individual, I find that the Database contains "diagnostic, treatment and care information", as defined in section 1(1)(i) of HIA.

[para 51] "Health information" under section 1(1)(k) of HIA means "diagnostic, treatment and care information" *or* "registration information". As there is "registration information" and possibly also "diagnostic, treatment and care information", I find that the information in the Database that pertains to Clinic patients is "health information" under section 1(1)(k) of HIA.

Custodian

[para 52] The parts of the definitions relating to the meaning of "custodian" are:

> 1(1)(f) "custodian" means
>
> (ix) a health services provider who is paid under the Alberta Health Care Insurance Plan to provide health services.
>
> 1(1)(m) "health service" means a service that is provided to an individual
>
> (i) for any of the following purposes and is directly or indirectly and fully or partially paid for by the Department:
>
> (A) protecting, promoting or maintaining physical and mental health;
>
> (B) preventing illness;
>
> (C) diagnosing and treating illness;
>
> (D) rehabilitation;
>
> (E) caring for the health needs of the ill, disabled, injured or dying.
>
> 1(1)(n) "health services provider" means an individual who provides health services.

[para 53] The Complainant did not explicitly refer to the definition of a "custodian" under HIA or address who might fall within that definition in the facts of this case. The Form asked Clinic patients to answer questions about past medical history as "part of your evaluation". The Complainant states:

> I am a patient of Dr. Lycka's. … My name and address were provided to Dr. Lycka's office for the sole purpose of creating a patient (medical) file so that he might provide me with medical treatment of my skin cancer.

[para 54] Excerpts from Dr. L.'s description of the Professional Corporation and the Clinic are as follows:

> The clinical services provided by Dr. Lycka through the Professional Corporation include consultation, biopsy, diagnostic services, therapeutic surgery, cosmetic surgery, and other treatment regimes. The Professional Corporation runs a licensed non-hospital surgical facility and has therapeutic lasers (the "Clinic"). Two days a week Dr. Lycka provides consultation services to 50-60 patients per day. This would include 30-50 biopsy procedures.
>
> Many of the patients attend the Clinic multiple times or are repeat patients who have visited previously. Three days a week Dr. Lycka does surgical procedures with [sic] includes, but is not limited to, treating individuals, both male and female with basil and squamous cell carcinomas. Some services done in the Clinic are paid through the Alberta Health Insurance Plan and some are paid by the patients directly.
>
> Only Respondent, Dr. Lycka is a custodian under HIA.
>
> Dr. Lycka's clinical practice of dermatology is organized, for business purposes, under his professional corporation, i.e., Dr. Barry Lycka, Professional Corporation (the "Professional Corporation"). … In addition to Dr. Lycka, the Clinic employs over 15 people including registered nurses, physician extenders, estheticians, office support and administrative staff.

[para 55] In regard to Corona and the Foundation, Dr. L. says:

> In addition, from time to time, all three of the Respondents have attended at trade shows in the Edmonton area. At shows such as the Bridal Show and the Women's Show the Respondents have forms which some people voluntarily sign requesting to receive further information about one or more of the services of the Respondents.

[para 56] Dr. L. says that he is a custodian under HIA. Dr. L. says that he provides clinical services through the Professional Corporation that include diagnostic services, therapeutic surgery and other treatment regimes. Dr. L. says the Professional Corporation runs a licensed non-hospital surgical facility with therapeutic lasers at the Clinic. Dr. L. performed surgery for skin cancer on the Complainant.

[para 57] The Complainant says that she provided the information on the Form when she was at the Clinic for a physician visit. The Form contains questions about health and medical history and is described as, "part of your evaluation". I accept the

evidence of the Complainant that she completed the Form at the Clinic in the context of obtaining medical treatment for her skin cancer.

[para 58] The Form is a means of obtaining a current medical history to enable a treating physician to provide appropriate medical treatment. There is no suggestion that the Clinic visit was anything other than a publicly paid service for medical evaluation and treatment. I accept the Complainant's submission that the sole purpose of her visit to the Clinic and hence, for completing the Form, was to obtain medical treatment from Dr. L. Furthermore, Dr. L. admits that he is a custodian under HIA when providing health services.

[para 59] The Database contains information about Clinic patients as well as non-patients. The information in the Database was gathered over time by different entities in different settings. Dr. L. says that some of the information that is now in the Database was collected at trade shows, the Bridal Show and the Women's Show. However, these are not the kind of services that Dr. L. was providing to the Complainant when she completed the Form.

[para 60] In my view, this case is the typical scenario of a patient seeking follow up medical treatment from a treating physician in the publicly paid health system. Dr. L. previously performed surgery to remove cancerous tissue. The patient completed the Form to update medical history when receiving a health service in the publicly paid health system. There is no evidence before me to suggest that Dr. L. was not being paid under the Alberta Health Care Insurance Plan to provide these health services to the Complainant.

[para 61] In my view in the circumstances of this case, Dr. L. was providing a service that was fully or partially paid for by the Department for the purposes of protecting, promoting or maintaining physical health, preventing illness and for diagnosing and treating illness, and therefore, was providing a service that was a "health service", as defined in section 1(1)(m)(i) of HIA. Therefore, Dr. L. was a "health services provider" under section 1(1)(n) who was providing a "health service" to the Complainant, under section 1(1)(f)(ix) of HIA.

[para 62] I accept Dr. L.'s submission that he is a Custodian under HIA. Therefore, I find that in regard to the individually identifying health information that was collected on the Form and subsequently entered into the Database, that Dr. L. is a "custodian" under section 1(1)(f)(ix) of HIA.

ISSUE C: DID THE CUSTODIAN COLLECT THE HEALTH INFORMATION IN CONTRAVENTION OF, OR IN COMPLIANCE WITH, SECTION 18 OF HIA (NO COLLECTION EXCEPT IN ACCORDANCE WITH HIA)?

ISSUE B: DID THE CUSTODIAN HAVE AUTHORITY TO COLLECT THE HEALTH INFORMATION UNDER SECTION 20 OF HIA (COLLECTION PERMITTED IN SPECIFIED CIRCUMSTANCES)?

Collection

[para 63] HIA defines "collect" as follows:

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

[para 64] The relevant rules governing collection of health information in Part 3 (Collection of Health Information) of HIA say:

> 18 No custodian shall collect health information except in accordance with this Act.
>
> 20 A custodian may collect individually identifying health information
>
> (a) if the collection of that information is expressly authorized by an enactment of Alberta or Canada, or
>
> (b) if that information relates directly to and is necessary to enable the custodian to carry out a purpose that is authorized under section 27.
>
> 27(1) A custodian may use individually identifying health information in its custody or under its control for the following purposes:
>
> (a) providing health services.

[para 65] In regard to collection, the Complainant says:

> I believed my personal contact information was collected by Dr. Lycka solely for the purposes of creating a private, personal medical file to assist in providing medical treatment for my skin cancer.

[para 66] In regard to collection, Dr. L. says:

> In 2000 because of the large numbers of patients who had been seen in the Clinic over the years, and because of the repeated requests for information and seminars, the Clinic established a database with the names, phone numbers and addresses of all the patients who had recently attended the Clinic. …Major changes were made with the coming into force of the Personal Information Protection Act ("PIPA") in 2004. … Every time a former patient comes to the clinic, their information is checked to ensure they have been asked for consent to be on the mailing list. If the new form is not on the chart, the patients, upon their arrival at the Clinic, are asked to complete the form found at Tab 4.

[para 67] I accept Dr. L.'s submission that the Form was a means for collecting and updating the health information of Clinic patients in the Database. The parties do not dispute that Dr. L. collected health information from the Complainant. In my view Dr. L. gathered, acquired, received or obtained health information about the Complainant, and thereby collected her health information, as defined in section 1(1)(d) of HIA.

[para 68] However, at the same time that Dr. L. collected health information for the purpose of providing health services to the Complainant, Dr. L. also collected health

information for other purposes, which included updating the Database and sending the mailings. Collection for these other purposes will be discussed in more detail later.

Sections 18 and 20

[para 69] Section 18 is the general prohibition that says no custodian shall collect health information except in accordance with HIA. This means that the collection must be authorized under some provision of HIA, or a custodian is prohibited from collecting the health information. I will first consider whether section 20 or section 27 of HIA allow the collection at issue. If the collection is not allowed under section 20 or section 27 of HIA, this means that section 18 prohibits a custodian from collecting the health information.

[para 70] In regard to collection, the Complainant said:

> I clearly indicated in writing on that form, that I did NOT want to be included on any mailing list. I also verbally expressed my desire to 'opt out' of such solicitations to the reception staff on duty.

[para 71] In her rebuttal submission, the Complainant says:

> At a return visit for medical follow-up, I was asked to complete the revised Patient History form and as noted in my initial complaint, I indicated "No" to Question 40. I chose to not be added to the mailing list (database). I also stated this specific request to the administrative staff when I submitted my completed Patient History form.
>
> There is no mention on the form about how the information collected will be used and distributed, sold or rented, and how it will be protected. … Although it's stated you collect information appropriately, this is not true. The truth is at no time have I given my permission for my contact information to be added to the mailing list (database).

[para 72] In regard to authority to collect the health information, Dr. L. says:

> [T]he database was established with a primary purpose of keeping track of all the patients seen in the Clinic. A secondary purpose was to facilitate information distribution by enabling more efficient and timely mail-out information to former patients, and other members of the public who have expressed an interest in the services, including the informational services, provided by Dr. Lycka. …
>
> Because there has been explicit consent to the collection and use of the information, sections 18, 20, 25, 27, and 31 of HIA are not relevant to this inquiry. … The Respondents submit there was no breach of PIPA or HIA for the following reasons:
> (a) the information was collected properly pursuant to both HIA and PIPA.

[para 73] Dr. L. comments about the absence of a consent provision for collection or use, in contrast to section 34 of HIA which allows consent for disclosure, as follows:

> There is no similar consent provision for the "use" or "collection" of health information. We respectfully submit, when the individual has given consent "to be added to the mailing list" and that is the use of their health information, then the HIA has not been contravened.

[para 74] Dr. L. says that notwithstanding the silence of HIA, that HIA should be interpreted to allow a custodian to collect or use health information for any purpose where there is consent. However, as Dr. L. says, HIA is silent about whether consent provides authority for collection and use of health information. In contrast to collection and use, HIA has a provision that allows disclosure with consent. Does HIA authorize a custodian to collect, use or disclose individually identifying health information for purposes of marketing and soliciting for fundraising with consent?

Approach to interpretation

[para 75] The preferred approach to the interpretation of legislation is the "modern principle", which says that I must read the words in an enactment "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Markham Ontario: Butterworths, 2002, p. 1). This principle says the context, the entirety of the Act and evolving legal norms must be considered.

[para 76] The "modern principle" is to be applied in conjunction with the *Interpretation Act*, R.S.A. 2000, c. I-8 ("*Interpretation Act*"), which says "[a]n enactment shall be construed as being remedial, and shall be given the fair large and liberal construction and interpretation that best ensures the attainment of its objects" (section 10). The "modern principle" has been canvassed in previous Orders issued under HIA by this Office (see, for example, Orders H2006-002 (paras 27-39), F2006-021 & H2006-001 (paras 45-62), F2005-017 & H2005-001 (paras 25-26), H2004-002 (paras 50-51)) and F2004-005 & H2004-001 (paras 46-52)), so there is no need to repeat those discussions here.

Scheme and Objects

[para 77] When interpreting the collection, use and disclosure provisions in HIA as they pertain to marketing and soliciting for fundraising, I must read the words harmoniously with the scheme and objects of HIA. The purposes of HIA are expressly set out in section 2. One of the purposes of HIA is to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information (section 2(a)).

[para 78] A further stated purpose of HIA is to enable health information to be shared and accessed, where appropriate, to provide health services (section 2(b)) and to prescribe rules for the collection, use and disclosure of health information, which are to be carried out in the most limited manner and with the highest degree of anonymity that

is possible in the circumstances (section 2(c)). The purposes of HIA also include establishing strong and effective remedies for contraventions of the Act (section 2(f)).

Evolving Legal Norms

[para 79] When interpreting the collection, use and disclosure provisions under HIA as they pertain to marketing and soliciting for fundraising, I must consider evolving legal norms. For that reason, I will briefly canvass the health information legislation that exists in three other Canadian jurisdictions as well as the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP") in Alberta as those provisions pertain to collection, use and disclosure of health or personal information in the public sector for purposes of marketing and soliciting for fundraising.

[para 80] Similar to HIA, the health information legislation in Manitoba (*The Personal Health Information Act*, S.M. 1997, c. 51 or C.C.S.M. c. P33.5 ("PHIA")) does not specifically address marketing and soliciting for fundraising. However, PHIA does expressly prohibit the disposal or disclosure of health information for purposes of sale, with some exceptions (section 27). PHIA restricts collection and prohibits a trustee from collecting health information unless the information is collected for a lawful purpose connected with a function or activity of the trustee and collection is necessary for that purpose (section 60(e)).

[para 81] PHIA restricts use, as a trustee is allowed to use health information only for the purpose for which it was collected unless the other purpose is directly related to the purpose for which the health information was collected, pursuant to consent for the use or with statutory authority (section 21). PHIA restricts disclosure, as a trustee is allowed to disclose health information only pursuant to consent or authority under PHIA or another enactment (sections 22(1)(2)). In contrast to HIA, PHIA explicitly allows trustees to use and disclose health information for any purpose pursuant to consent.

[para 82] Similar to HIA, the health information legislation in Saskatchewan (*Health Information Protection Act*, S.S. 1999, c. H-0.021 ("HIPA")) does not specifically address marketing and soliciting for fundraising. HIPA restricts collection and requires a trustee to ensure that the primary purpose for collecting health information is for a program, activity or service of the trustee that can reasonably be expected to benefit the individual, for secondary purposes consistent with disclosure allowed under HIPA, under another enactment and for any purpose with consent (section 24).

[para 83] Under HIPA, a trustee must not use health information except with consent or in accordance with section 26 of HIPA. A trustee must not disclose health information except with consent or in accordance with exceptions to consent that are explicitly prescribed under sections 27, 28, 29 of HIPA. Similar to PHIA, HIPA allows trustees to use and disclose health information for any purpose with consent. In contrast to HIA and PHIA, HIPA explicitly allows trustees to collect health information for any purpose with consent.

[para 84] In contrast to the other jurisdictions, the health information legislation in Ontario (*Personal Health Information Protection Act, 2004*, S.O 2004, c. 3, Schedule A ("PHIPA")) specifically addresses marketing and soliciting for fundraising. In regard to marketing, PHIPA prohibits a custodian from collecting, using or disclosing health information for purposes of marketing or market research unless the individual expressly consents to the collection, use or disclosure (section 33).

[para 85] In regard to fundraising activities, PHIPA allows a custodian to collect, use or disclose health information with express consent, or alternatively with implied consent when the information involves only name and prescribed contact information (section 32(1)). The regulation under PHIPA (*Ontario Regulation,* 329/04 ("ONT Reg.")) limits contact information for fundraising activities to mailing address (section 10(1)).

[para 86] Collection, use or disclosure is restricted to fundraising for the custodian's operations (section 10(2)), solicitations must provide an easy way to opt-out of future solicitations (section 10(3)) and fundraising communications must not include information about the individual's health (ONT Reg., section 10(4)). The fundraising provisions under PHIPA were considered in a complaint that was successfully mediated and reported in Resolution Summary HC-050001-1.

[para 87] FOIP in Alberta explicitly addresses the collection, use and disclosure of personal information for purposes of fundraising. FOIP allows indirect collection of personal information from published or other public sources for the purpose of fundraising (section 34(1)(f)), use and disclosure of personal information pursuant to consent (sections 39(1)(b) and 40(1)(d)) and use and disclosure of personal information in alumni records for fundraising activities with some restrictions (FOIP sections 39(2), 39(3)) and 40(2)). In contrast to other legislation, the Legislature chose to take a different approach and did not enact similar provisions in HIA.

Context

[para 88] When interpreting the collection, use and disclosure provisions in HIA in regard to marketing and soliciting for fundraising, I must consider the "context that colours the words". The situation before me is a cancer patient who is visiting her treating physician for medical treatment and review of the progression of skin cancer. For that reason, I will refer to guidelines of the medical profession for protecting the privacy of health information in the context of the doctor-patient relationship.

[para 89] The Canadian Medical Association ("CMA") *Code of Ethics*, which is supported by the College of Physicians and Surgeons of Alberta ("CPSA"), advises physicians to:

> Disclose your patient's personal health information to third parties only with their consent, or as provided by law, such as when the maintenance of confidentiality would

> result in a significant risk of substantial harm to others (Canadian Medical Association, *CMA Code of Ethics*, 2004).

[para 90] The *Health Information Privacy Code*, also issued by CMA, reads:

> Governing principles and rules for health information must recognize the patient's right of privacy in health information, its highly sensitive nature, the circumstances of vulnerability and trust under which it is confided or collected, and the fiduciary duties of health professionals in relation to this information. … The principal purpose for the collection of health information is to benefit the patient who confides or permits information to be collected for a therapeutic purpose (Canadian Medical Association, *CMA Health Information Privacy Code*, August 15, 1998).

[para 91] The *Transition to Electronic Medical Records (EMR)*, issued by the CPSA, states:

> Physicians have a fiduciary and professional responsibility to collect patient information with sufficient information to allow another physician to assume the patient's care at any point in the course of treatment without the loss of continuity. … The Health Information Act defines the parameters for the disclosure and use of health information and the requirements for the collection of consent. … Electronic medical records dramatically increase the ability of physicians to use patient information for new purposes, based on the ability to search, aggregate, correlate and otherwise manipulate individual information (College of Physicians and Surgeons of Alberta*, Transition to Electronic Medical Records (EMR)*, CPSA Guideline, September 2004, p. 4).

[para 92] The *Data Stewardship Framework*, also issued by the CPSA, states:

> Physician stewardship of medical information is a well established trust both in practice and legally enshrined in law. A physician is legally obligated to maintain a medical record of the care provided, while the doctor-patient relationship requires a patient's confidence and trust in the management of their information, and establishes a burden on the physician to maintain that trust. …
>
> A physician has a duty to act in good faith vis-à-vis their patients and to protect the confidentiality of the information in their trust. … This duty requires that physicians limit disclosures to those with a need to know and unless the physician is authorized by law to disclose the information without consent, requires the informed consent of the patient if the use or disclosure of the patient's information extends beyond the clinical use for which it was obtained (College of Physicians and Surgeons of Alberta, *Data Stewardship Framework*, Version 1.2, Medical Informatics Committee of the CPSA, December 1, 2006, pp. 19, 29).

Application

[para 93] The Complainant says that Dr. L. collected, used and disclosed her health information for purposes of marketing and soliciting for fundraising without her consent and against her wishes. Therefore, the Complainant says that Dr. L.'s collection for purposes of marketing and soliciting for fundraising was in contravention of HIA. In

contrast, Dr. L. says that the Complainant provided consent for collection, use and disclosure, and that consent provides authority to collect, use and disclose health information for purposes of marketing and soliciting for fundraising under HIA.

[para 94] Dr. L. says collection of the health information in the Database is authorized under section 20 of HIA, and in particular is authorized under section 27 of HIA, as the information was collected for the primary purpose of providing health services under section 27(1)(a) of HIA. However, collection of health information for purposes of provision of health services is *not* at issue at the Inquiry. Dr. agrees that the information was also collected for other purposes, which are the focus of the Inquiry.

[para 95] HIA authorizes custodians to collect individually identifying health information in specified circumstances and for specified purposes. Section 20(a) of HIA authorizes custodians to collect individually identifying health information when expressly authorized by an enactment. Section 20(b) of HIA authorizes custodians to collect health information if the information relates directly to and is necessary to enable a custodian to carry out a purpose that is authorized under section 27 of HIA. There is no mention of consent in section 20 or section 27 of HIA.

[para 96] Section 27(1), in combination with section 20(b) of HIA, prescribes the purposes for which custodians are authorized to collect individually identifying health information, such as for the provision of health services (section 27(1)(a)). The corollary of these two provisions is that HIA does not authorize custodians to collect individually identifying health information in circumstances that fall outside of section 20 or for purposes that are not prescribed in section 27 of HIA.

[para 97] Dr. L. mentions the absence of a provision in HIA that explicitly allows consent as authority for a custodian to collect individually identifying health information for any purpose, including for purposes of marketing and soliciting for fundraising. I agree with Dr. L. that HIA does not contain such a provision for collection of health information. HIA is silent about whether consent provides authority for a custodian to collect health information for purposes other than the circumstances that are set out in section 20 and the purposes that are set out in section 27 of HIA.

[para 98] In my view, consent does not authorize a custodian to collect individually identifying health information for purposes that are not prescribed in section 20 and section 27 of HIA. Sections 20 and 27 of HIA are a complete list. Marketing and soliciting for fundraising are not purposes that are listed in sections 20 or 27 of HIA. Therefore, section 20 of HIA does not provide authority for custodians to collect individually identifying health information for purposes of marketing and soliciting for fundraising with *or* without consent.

[para 99] Furthermore, there is no consent in accordance with section 34(2) of HIA. Even if HIA authorized custodians to collect individually identifying health information for purposes of marketing and soliciting for fundraising with consent (*which HIA does not*), there is no consent under HIA. The criteria for consent under HIA are prescribed in

section 34(2) of HIA, which pertains only to disclosure. In this case, there is no consent for collection that fulfills the criteria for consent in section 34(2) of HIA.

[para 100] I accept the Complainant's submission that Dr. L. collected her health information for purposes that included marketing and soliciting for fundraising, when the information was collected on the Form. Although consent is irrelevant in relation to a custodian such as Dr. L., I accept the Complainant's submission that she did not consent to collection for this purpose, and that she expressly refused consent by means of the opt-out box on the Form. In my view, the Complainant discharged the initial burden of proof to show that Dr. L. collected her health information.

[para 101] I do not accept Dr. L.'s argument that consent provides authority under HIA for collection of health information for purposes of marketing and soliciting for fundraising, under section 20 or section 27 of HIA. In my view, Dr. L. did not discharge the burden of proving that any collection was in accordance with section 20 of HIA. The above factors weigh in favour of a finding that Dr. L. did not have authority to collect the health information under section 20 of HIA (collection permitted in specified circumstances).

[para 102] In its silence in Part 3, HIA has spoken. Health information cannot be collected except in accordance with HIA. HIA allows collection in accordance with prescribed statutory purposes, but does not allow collection for other purposes, even with consent. In my view, this approach is consistent with the health professional guidelines and the key reason for collecting health information, which is to provide health services in order to benefit the patient in "circumstances of vulnerability and trust under which it is confided or collected and the fiduciary duties of health professionals".

[para 103] In my view, Dr. L. did not discharge the burden of proving that any collection was in accordance with section 20 of HIA. For all of the above reasons, I find that Dr. L. did not have authority and therefore was not permitted to collect the health information for purposes of marketing and soliciting for fundraising under section 20 of HIA (collection permitted in specified circumstances).

[para 104] The prohibition in section 18 of HIA says that a custodian cannot collect individually identifying health information, except in accordance with HIA. I said Dr. L. does not have authority to collect health information for purposes of marketing and soliciting for fundraising, under section 20 or section 27 of HIA. Therefore, Dr. L. does not have authority under HIA for the collection. In my view, Dr. L. has not discharged the burden of proving that any collection was in accordance with section 18 of HIA.

[para 105] Given my finding under section 20 of HIA, I find that Dr. L.'s collection of health information, for purposes of marketing and soliciting for fundraising, was not in accordance with, and therefore was in contravention of, section 18 of HIA (no collection except in accordance with HIA).

[para 106] In my view, this finding does not preclude a custodian from making information available to individuals who wish to contact fundraising agencies. For

example, I see nothing that precludes a custodian from displaying pamphlets for a charitable organization such as a foundation, so that individuals can make direct contact with that other entity, should they wish to do so.

ISSUE E: DID THE CUSTODIAN USE THE HEALTH INFORMATION IN CONTRAVENTION OF, OR IN COMPLIANCE WITH, SECTION 25 OF HIA (NO USE EXCEPT IN ACCORDANCE WITH HIA)?

ISSUE D: DID THE CUSTODIAN HAVE AUTHORITY TO USE THE HEALTH INFORMATION UNDER SECTION 27 OF HIA (USE PERMITTED IN SPECIFIED CIRCUMSTANCES)?

Use

[para 107] HIA defines "use", as follows:

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

[para 108] The relevant rules governing use of health information in Part 4 (Use of Health Information) of HIA, read:

> 25 No custodian shall use health information except in accordance with this Act.
>
> 27(1) A custodian may use individually identifying health information in its custody or under its control for the following purposes:
>
> (a) providing health services.

[para 109] In regard to use, the Complainant says:

> The truth is once HIA came into force, permission was NOT sought from Dr. Lycka's former patients for the continued use of our names, phone numbers and mailing addresses on the *existing* mailing list (database). … The truth is my information was entered into and remains on the database without my permission. …
>
> The mailing list (database) is made up of Dr. Lycka's patient contact information, in addition to other supporters or friends. This information was collected and stored without my permission. …
>
> The truth is I did not give my permission for my contact information to be extracted from my medical file and entered into a database. … However, this contact information was only provided to Dr. Lycka for the purposes of creating a medical file, which is a necessary, required document used by medical personnel in the course of treatment of my skin cancer.

[para 110] Dr. L. says the mailings were as follows:

- April 10, 2006 – 14,992 letters sent;
- May 23, 2006 – 14,836 letters sent;
- June 12, 2006 – 14,716 letters sent; and
- June 19, 2006 – 14,635 letters sent.

[para 111] In regard to authority for use, Dr. L. says:

> However, the Respondents argue the use of this information was with consent of patients/clients, as demonstrated by the consent filled out by the patient to receive information on the Patient History Form, the Foundation Consent form and the Consultation Form. … The use made of health information in this case was very narrow in that only the names and addresses were used. This use was also with consent of the individual who provided the information. …
>
> The Respondents submit they were authorized by way of the consents to use the "individually identifying" "health information" for the purpose for which the consent was given, which although not explicitly expressed in HIA, is in keeping with the Purpose of the Act as set out in s. 2. … The Respondents submit there was no breach of PIPA or HIA for the following reasons: … (b) the use of mailing address is not an invasion of privacy.

[para 112] I accept Dr. L.'s submission that the health information on the Form was used to provide health services, to compile the mailing list in the Database and also to mail the information in the letters. I find that Dr. L. applied the health information for a purpose, and therefore, "used" health information, as defined in section 1(1)(w) of HIA. I will now consider whether there was authority under HIA for use for purposes not pertaining to the provision of health services.

Sections 25 and 27

[para 113] Section 25 is the general prohibition that says no custodian shall use health information except in accordance with HIA. This means that the use must be authorized under some provision of HIA, or a custodian is prohibited from using the health information. I will first consider whether section 27 of HIA allows the use at issue. If the use is not allowed under section 27 of HIA, this means that section 25 prohibits a custodian from using the health information.

[para 114] The Complainant says that Dr. L. used her health information for purposes of marketing and soliciting for fundraising without her consent and against her wishes. Therefore, the Complainant says that Dr. L.'s use for marketing and soliciting for fundraising was in contravention of HIA. In contrast, Dr. L. says that the Complainant provided consent for the use and that consent provides authority for the use of health information for purposes of marketing and soliciting for fundraising.

[para 115] Dr. L. argues that use of the health information in the Database was authorized under section 27 and, in particular, was authorized under section 27(1)(a) of HIA, as the information was used for the primary purpose of providing health services.

However, use for provision health services is *not* at issue at the Inquiry. Dr. L. agrees that the information was also used for other purposes, which are the focus of the Inquiry.

[para 116] Section 27 of HIA authorizes custodians to use individually identifying health information for specified purposes. Section 27(1) of HIA authorizes custodians to use individually identifying health information only for a purpose that is listed under section 27(1) or section 27(2) of HIA. Section 27(1)(a) of HIA permits custodians to use individually identifying health information for the purpose of providing health services. The corollary is that HIA does not permit custodians to use individually identifying health information for purposes that are not prescribed in section 27 of HIA. There is no mention of consent in section 27 of HIA.

[para 117] Dr. L. commented about the absence of a provision in HIA that explicitly allows consent as authority for a custodian to use health information for any purpose, including purposes of marketing and soliciting for fundraising. This is in contrast to consent for disclosure that is not limited in its purposes, in section 35 of HIA. I agree with Dr. L. that HIA does not contain any such provision for use of health information. I said that HIA is silent about whether consent provides authority for a custodian to use health information for purposes other than the purposes set out in section 27 of HIA.

[para 118] In my view, consent not authorize a custodian to use individually identifying health information for purposes that are not prescribed in section 27 of HIA. Section 27 of HIA is a complete list. Marketing and soliciting for fundraising are not one of the purposes that are listed in section 27 of HIA. Therefore, section 27 of HIA does not provide authority for custodians to use individually identifying health information for purposes of marketing and soliciting for fundraising with *or* without consent.

[para 119] Furthermore, even if HIA authorized custodians to use individually identifying health information for purposes of marketing and soliciting for fundraising with consent (*which HIA does not*), there is no consent under HIA. The criteria for consent under HIA are prescribed in section 34(2) of HIA, which pertains only to disclosure. In this case, there is no consent for use that fulfills the criteria for consent in section 34(2) of HIA.

[para 120] I accept the Complainant's submission that Dr. L. used her health information for purposes that include entering the information into the Database and mailing the "solicitations". Although consent is irrelevant in relation to a custodian such as Dr. L., I accept the Complainant's submission that she did not provide consent for this use, and that she expressly refused consent by means of the opt-out box on the Form. In my view, the Complainant did discharge the initial burden of proof to show that Dr. L. used her health information.

[para 121] I do not accept Dr. L.'s submission that consent provides authority for use of health information for purposes of marketing and soliciting for fundraising, under section 27 of HIA. I also do not accept Dr. L.'s argument that the general purposes in

section 2 of HIA override the specific purposes in section 27 of HIA, to authorize Dr. L.'s use of the health information for purposes of marketing and soliciting for fundraising.

[para 122] In my view, Dr. L. did not discharge the burden of proving that any use was in accordance with section 27 of HIA. For all of the above reasons, I find that Dr. L. did not have authority and therefore was not permitted to use the health information for purposes of marketing and soliciting for fundraising under section 27 of HIA (use permitted in specified circumstances).

[para 123] The prohibition in section 25 of HIA says that a custodian cannot use individually identifying health information, except in accordance with HIA. I said Dr. L. does not have authority to use the health information for purposes of marketing and soliciting for fundraising, under section 27 of HIA. Therefore, Dr. L. does not have authority under HIA for the use. In my view, Dr. L. did not discharge the burden of proof to show that any use was in accordance with section 27of HIA.

[para 124] Given my finding under section 27 of HIA, I find that Dr. L.'s use of the individually identifying health information, for purposes of marketing and soliciting for fundraising, was not in accordance with, and therefore, was in contravention of, section 25 of HIA (no use except in accordance with HIA).

[para 125] In my view, this finding is consistent with section 107(2)(f), under "Offences and Penalties" in Part 8 (General Provisions), of HIA. Section 107(2)(f) prohibits a person from using individually identifying health information to market any service for a commercial purpose or to solicit money, except with specific consent for use for that purpose. Section 107(2)(f) of HIA does not prohibit all use of health information for marketing and soliciting for fundraising, although custodians are prohibited from this use under section 25 and section 27.

ISSUE I: DID THE CUSTODIAN DISCLOSE THE HEALTH INFORMATION IN CONTRAVENTION OF, OR IN COMPLIANCE WITH, SECTION 31 OF HIA (NO DISCLOSURE EXCEPT IN ACCORDANCE WITH HIA)?

ISSUE F: DID THE CUSTODIAN HAVE AUTHORITY TO DISCLOSE THE HEALTH INFORMATION UNDER SECTION 34 OF HIA (DISCLOSURE PERMITTED WITH CONSENT)?

ISSUE G: DID THE CUSTODIAN HAVE AUTHORITY TO DISCLOSE ANY "DIAGNOSTIC, TREATMENT AND CARE INFORMATION" UNDER SECTION 35 OF HIA (DISCLOSURE PERMITTED WITHOUT CONSENT IN SPECIFIED CIRCUMSTANCES)?

ISSUE H: DID THE CUSTODIAN HAVE AUTHORITY TO DISCLOSE ANY "REGISTRATION INFORMATION" UNDER SECTION 36 OF HIA (DISCLOSURE PERMITTED WITHOUT CONSENT IN SPECIFIED CIRCUMSTANCES)?

Disclosure

[para 126] "Disclose" is not defined in HIA, but is defined in the health information legislation in Ontario (*Personal Health Information Protection Act, 2004*, S.O 2004, c. 3, Schedule A ("PHIPA")), as follows:

> 2. "Disclose", in relation to personal health information in the custody or under the control of a health information custodian or a person, means to make the information available or to release it to another health information custodian or to another person, but does not include to use the information, and "disclosure" has a corresponding meaning.

[para 127] The guidelines published by the ministry responsible for HIA say:

> "Disclosure" refers to the release, transmittal, exposure, revealing, showing, providing copies of, telling the contents of, or giving health information by any means to any person or organization. It includes disclosure to another custodian or to a non-custodian. It includes oral transmission by telephone, voice mail or in person; provision of the information on paper, by facsimile or in another format; and electronic transmission through electronic mail, data transfer or the Internet (Alberta Health and Wellness, *Health Information Act: Guidelines and Practices Manual – Alberta's Health Information Act,* Alberta Health and Wellness, 2006, p. 167).

[para 128] The meaning of "disclose" can be inferred from the wording of Part 5 ("Disclosure of Health Information") of HIA. For example, section 35 of HIA contains a list of disclosures where custodians make information available to other custodians (sections 35(1)(a), 35(1)(k), 35(1)(q)) and to non-custodians (sections 35(1)(a.1)-(i), 35(1)(l)-(p), 35(1)(r)-(s)). In my view, there is disclosure under HIA when a custodian makes information available or releases information to another custodian or to a non-custodian.

[para 129] The relevant rules governing disclosure of health information in Part 5 (Disclosure of Health Information) of HIA, says:

> 31 No custodian shall disclose health information except in accordance with this Act.
>
> 34(1) Subject to sections 35 to 40, a custodian may disclose individually identifying health information to a person other than the individual who is the subject of the information if the individual has consented to the disclosure.
>
> 34(2) A consent referred to in subsection (1) must be provided in writing or electronically and must include
>
>> (a) an authorization for the custodian to disclose the health information specified in the consent,
>>
>> (b) the purpose for which the health information may be disclosed,
>>
>> (c) the identity of the person to whom the health information may be disclosed,

(d) an acknowledgment that the individual providing the consent has been made aware of the reasons why the health information is needed and the risks and benefits to the individual of consenting or refusing to consent,

(e) the date the consent is effective and the date, if any, on which the consent expires, and

(f) a statement that the consent may be revoked at any time by the individual providing it.

34(3) A disclosure of health information pursuant to this section must be carried out in accordance with the terms of the consent.

35(1) A custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information

(a) to another custodian for any or all of the purposes listed in section 27(1) or (2), as the case may be, …

(b) to a person who is responsible for providing continuing treatment and care to the individual.

36 A custodian may disclose individually identifying registration information without the consent of the individual who is the subject of the information

(a) for any of the purposes for which diagnostic, treatment and care information may be disclosed under section 35(1) or (4),

[para 130] In regard to disclosure, the Complainant says:

Corona Spa and the Canadian Skin Cancer Foundation [CSCF] were directly provided my name and mailing address from my medical file held at Dr. Lycka's office. …

Dr. Lycka has my name and mailing address imbedded in a shared database, which is frequently shared and utilized by his Clinic, Corona and CSCF. …

Dr. Lycka did not protect my personal and health information within the confines of his medical office and practice. Instead, Dr. Lycka has repeatedly and blatantly initiated the sharing and distribution of my personal and contact information to two outside non-medical organizations that are completely unrelated to my health care. …

In fact, Dr. Lycka has initiated freely sharing this information with two organizations who have repeatedly solicited me for donation of goods, services and cash and retail purchases of services and products.

Within a month I started to receive mailings from his office. … I continued to receive solicitations from both Dr. Barry Lycka's office and Corona Rejuvenation Centre. In fact, since my last appointment, I received no fewer than four mailings, each soliciting for either donations to this physician's favourite charity [a cancer foundation operating out of his office], a secret 'fundraising' event in celebration of this doctor's birthday being held at the Jubilee Auditorium, and solicitations from a private business [also operating

out of his office], offering beauty, spa, rejuvenating and other elective procedures for 'beauty and wellness'. …

My permission was not sought nor given for each individual entity, even though PIPA and HIA were already in force at the time I completed the revised Patient History form.

[para 131] Dr. L. describes relationships between the various entities, as follows:

> The Endermologie Centre Corporation is a separate legal entity owned by Ms. [first name of individual] Bernier-Lycka. Its operating arm is known as and operates as Corona Rejuvenation Center and Spa ("Corona"). Corona was first registered and began operations in 2004.
>
> At one time, Corona was operated through the Clinic, but with the coming into force of the *Health Information Act* (HIA), it was recognized these services had different purposes and therefore the legal entities were separated.
>
> The Canadian Skin Cancer Foundation (the "Foundation") is a nonprofit charitable organization with its own Board of Directors and operates separately from the Clinic, the Professional Corporation and Corona.
>
> The Foundation was first registered as an active non-profit society in 2003, but fund raising efforts had been initiated prior to that time. These efforts were coordinated by Dr. Lycka personally.
>
> The Respondent entities are related but separate organizations. Corona at one time was mixed with the Clinic, but is now a separate business. Many of the patients of the Clinic are also involved with the Foundation, but each entity has their own method of obtaining consent from the patients/clients to include their names on the mailing list.
>
> When the services currently provided by Corona were still part of the Clinic, skin care products were sold through the Clinic.
>
> Clients and patients from each entity, from time to time, receive information about services in the other entities. This came about because many of the individuals overlap and have requested information about other aspects.

[para 132] Dr. L. says the mailings to the individuals in the Database were not a disclosure, because:

> The recipients of the letters were receiving their own information. There has been no breach of the principles of HIA. No one else was accessing their health information. … The information was not given to a third party, the custodian sent it back to the individual.

[para 133] The Complainant agreed with Dr. L. that it was not a disclosure to her when she "received my own information in the form of a mailing label on the exterior of the various solicitations prepared and mailed by or on behalf of CSCF (the Foundation) and Corona". However, the Complainant says her health information was disclosed when it was released to Corona and the Foundation as they are outside organizations.

[para 134] The Complainant says that when the Clinic put her health information into the Database, that this was a disclosure to Corona and the Foundation because the information is freely shared and readily available to outside organizations such as Corona and the Foundation. As the information was freely available, she says this was a disclosure by Dr. L. and a collection by Corona and the Foundation.

[para 135] Dr. L. disagrees with the Complainant. Dr. L. says that the Database is within the Clinic, and therefore it is a use and not a disclosure when the Clinic enters the patient information into the Database. Dr. L. also says that when the Clinic uses the health information in the Database, this is an internal matter within the Clinic and therefore this is not a disclosure.

[para 136] Dr. L. describes Corona and the Foundation as "related but separate organizations". Dr. L. says that some of the services that were previously provided by Dr. L. at the Clinic are now provided by these two separate legal entities. After the formation of the Database, the Foundation and Corona were registered as separate legal entities at corporate registry. However, the evidence shows that these three entities (i.e., Dr. L., Corona and the Foundation) remain intertwined in terms of their operations, individuals and geographic location.

[para 137] These three separate legal entities (as well as Endermologie, MSI and CJSM Publishing LTD.) have the same mailing address as either Dr. L.'s Clinic or a second location in the same building as Dr. L.'s Clinic. The individuals involved with Dr. L. and the Clinic hold multiple roles within these intertwined entities. It is not always evident in which capacity an individual is acting, in which capacity a name is being used or even which entity is initiating a particular form or letter.

[para 138] Dr. L.'s name appears on the Foundation form as "Barry S. Lycka, MD, FRCPC". It is not clear from the information on the form whether Dr. L. is acting on behalf of the Foundation, or alternatively, as a treating physician. The Foundation form begins with, "Dear Valued Patient", as if Dr. L. is acting in the capacity of the patient's treating physician. However, the form also says that Dr. L. is "intimately involved" with the Foundation. In the letters, the Controller of the Professional Corporation refers to patients, but requests donations for the Foundation and offers prizes from Corona.

[para 139] Some individuals hold titles in more than one of these entities. For example, Dr. L. is a physician at the Clinic and the President of the Foundation. The Controller of the Professional Corporation is also the Secretary of the Foundation. The Director of Endermologie, which is the legal entity behind the trade name of Corona, has the same registered address as Dr. L. The legal entity for the voting shareholders of Corona is Lycka Capital Corp. with the same address as the Clinic. Dr. L. has a clinical dermatology practice that includes endermology. The Complainant says that Corona is Dr. L.'s wife's medi-spa business.

[para 140] I accept the evidence that the Database evolved along with these entities. The Database was formed at the Clinic in 2000, which was before the Foundation,

Corona and Endermologie became separate legal entities. The Database began as a mechanism to enable the Clinic to keep track of its patients. However, the Database grew and changed to include a substantial percentage of non-patients. The Clinic is no longer the only source of information for the mailing list in the Database, which now includes contact information for individuals from Corona and the Foundation.

[para 141] According to Dr. L.'s submission, he has seen approximately 10,000 patients at the Clinic. The mailing list now consists of about 15,000 names, so at least one-third of the Database pertains to non-Clinic individuals. The mailing list or Database is currently used for a variety of purposes that range from the provision of health services to health promotion and to illness prevention -- and to marketing and soliciting for fundraising.

[para 142] In my view, when Dr. L. entered the Complainant's health information into the Database, in regard to Corona and the Foundation, this is a disclosure because the information was made available or released to separate legal entities. The health information in the shared Database is openly available and freely accessible by Corona and the Foundation. For the above reasons, I find that when Dr. L. entered the health information into the shared Database this was not only a use for Dr. L., but also a simultaneous disclosure by Dr. L. and a collection by Corona and the Foundation.

[para 143] Dr. L. says the "solicitations" were not a disclosure to the individuals because the information that was mailed to the individuals consists of their own name and mailing address, and it is not a disclosure to give individuals their own information. Dr. L. provided Investigation Report 2000-IR-002 in support of the argument that mailing a letter to an individual with their own contact information is not a disclosure to that individual under HIA. The Complainant agrees with Dr. L. on this point.

[para 144] I agree with the parties that there was no disclosure to the individuals in the mailing itself. However in my view, there was a disclosure that occurred before the mailing, which was when the information was made available to outside entities for the mailing to occur in the first place. Additionally, in the circumstances of this case, there is the possibility that the information provided in the return address of a physician who specializes in treating skin cancer patients and the return address of a cancer foundation might reveal health information such as an individual's medical diagnosis.

[para 145] Disclosure means to make information available or to release information to another entity including another custodian or a non-custodian. In my view, Dr. L. disclosed the Complainant's health information when the information was entered into the shared Database, as that was the step whereby the information became freely available and was released to and simultaneously collected by Corona and the Foundation.

[para 146] In my view, when the Complainant received the mailings from Corona and the Foundation, the mailing was merely evidence that Dr. L. had already disclosed the information. Receiving the mailings from Corona and the Foundation meant that Corona and the Foundation had already collected and used the Complainant's health

information, subsequent to the disclosure by Dr. L. When the Complainant received the mailings containing her own name and mailing address, she was made aware of the disclosure that had already occurred.

Sections 31, 34, 35 and 36

[para 147] Section 31 is the general prohibition that says no custodian shall disclose health information except in accordance with HIA. This means that the disclosure must be authorized under some provision of HIA, or a custodian is prohibited from disclosing the health information. I will first consider whether sections 34, 35 or 36 of HIA allow the disclosure at issue. If the disclosure is not allowed under sections 34, 35 or 36 of HIA, this means that section 31 prohibits a custodian from disclosing the health information.

Section 34

[para 148] In regard to disclosure, the Complainant says:

> The truth is Dr. Lycka did not seek my permission to initially include my information into the database for use and distribution to Corona and CSCF. … Nor did I give permission for my contact information to be used and distributed with outside organizations. This intended (ab)use of my contact information is not disclosed on the Patient History form. [Question 40] …
>
> As a physician who has worked for more than 20 years in the medical community I am sure you are familiar with the term "informed consent". There is no information provided when soliciting that consent on the Patient History form that describes the protection of that information, nor the intent, parameters, planned use and distribution of the information to for-profit organizations outside your medical practice. …
>
> The Patient History form does not disclose how the personal contact information collected will be protected, stored, used, distributed, shared and/or sold or leased, nor does it express that the information will be collected for the purposes of solicitation for, by or with outside organizations.

[para 149] Also in regard to disclosure, Dr. L. argues:

> Section 34 of HIA allows the "disclosure" to a third party of health information with consent. This information was not disclosed to a third party. …
>
> Although it is conceded there may have been a few patients on the database who may not have consented as they were patients prior to the enactment of HIA, the Respondent made every reasonable effort to establish policies and procedures, as set out in s. 63(1) of HIA, to ensure only the individuals who consented to being on the mailing list were on the list, and thereby receive the letters in question. …

> With respect to sections 34, 35, an [sic] 36, the Respondents submit these are also not relevant to the inquiry because: (a) section 34 deals with consent to give the information to a third party. The information was not given to a third party, the custodian sent it back to the individual.

[para 150] Section 34 authorizes custodians to disclose individually identifying health information with consent, as consent is described in HIA. Section 34 begins with the phrase, "subject to sections 35 to 40", a custodian may disclose health information with consent. Sections 35 to 40 of HIA set out the prescribed situations where a custodian may disclose health information without consent, pursuant to statutory authority to disclose without consent.

[para 151] Section 34 does not limit the purposes for which consent to disclosure can be provided. Section 34(1) of HIA permits custodians to disclose health information to a person other than the individual who is the subject of the information, with consent. Section 34(3) of HIA requires a disclosure of health information that is made pursuant to consent to be carried out in accordance with the terms of the consent. These provisions mean that Dr. L. would be allowed to disclose the Complainant's health information to Corona and the Foundation, if there was consent.

[para 152] Section 34(2) of HIA prescribes the criteria that must be met in order for there to be consent under HIA. All of the criteria in section 34(2) must be met before a custodian has the authority to disclose individually identifying health information pursuant to consent under HIA. The corollary of this provision is that HIA does not authorize the disclosure of individually identifying health information pursuant to consent unless all of the criteria in section 34(2) of HIA are met.

[para 153] Section 34(3) of HIA says that a disclosure must be in accordance with the terms of the consent. For consent to exist, all of the criteria in section 34(2) of HIA must be met, which include:

- Provided in writing or electronically,
- Authorization to disclose the health information specified in the consent,
- Purpose for which the health information may be disclosed,
- Identity of the person to whom the health information may be disclosed,
- Acknowledgment that the individual providing the consent has been made aware of the reasons why the health information is needed and the risks and benefits to the individual of consenting or refusing to consent,
- Date the consent is effective and the date, if any, on which the consent expires, and
- Statement that the consent may be revoked at any time by the individual providing it.

[para 154] I accept the Complainant's argument that Dr. L did not have authority to disclose her health information pursuant to consent under section 34 of HIA. Even if the Complainant had not opted out of the consent, in my view the opt-out provision in the Form does not satisfy any of the requirements in section 34(2) of HIA that must be met before consent exists. Therefore, in this case there is no authority to disclose health information pursuant to consent under section 34(2) of HIA.

[para 155] Dr. L. takes the position that any disclosure of the Complainant's health information was authorized pursuant to consent under section 34 of HIA. However, Dr. L. did not specifically address whether the criteria for consent that are set out in section 34(2) of HIA were fulfilled. In my view, the criteria in section 34(2) of HIA were not fulfilled. Question #40 in the Form does not satisfy the criteria in section 34(2) of HIA. I do not accept Dr. L.'s argument that the opt-out tick box on the Form is consent for disclosure of health information under section 34(2) of HIA.

[para 156] Dr. L. conceded that there may be a few patients in the Database who "may not have consented as they were patients prior to the enactment of HIA". As the Complainant is anonymous, Dr. L. cannot speak specifically to whether the Complainant was in this situation. However in my view, nothing turns on this point, because the Complainant clearly does not fall into this category. The Complainant attended Dr. L.'s Clinic in 2006 when her information was updated on the Form. In fact, the completion of the Form is the event that gave rise to the matters before the Inquiry.

[para 157] At one point, Dr. L. took the position that section 34 of HIA was not relevant because it pertains to consent to disclosure to a third party. Dr. L. says there is no disclosure because there is no third party involved. As I said, I do not accept this argument. Entering the Complainant's health information into the Database is a disclosure to Corona and the Foundation in the circumstances of this case, because this is a shared database. This is not just an internal database for Dr. L. at the Clinic. Rather, this is a shared database where the information is freely available to the outside entities of Corona and the Foundation.

[para 158] I do not accept Dr. L.'s argument that the health information was not made available to or released to outside entities. There is evidence showing that the Complainant received mailings from Corona and the Foundation, which shows that the health information was previously collected and used by these external entities. Even if the Complainant received her own health information in the mail from an external entity that still means that the health information was disclosed to the outside entity that sent her the mail.

[para 159] The Complainant says that Dr. L. did not have authority to disclose her health information to outside organizations such as Corona and the Foundation, pursuant to consent. She said that Dr. L. disclosed her health information in contravention of HIA, as the disclosure was not only without her consent, but was also against her expressed refusal of consent when she opted out of the Database on the Form and verbally told Clinic staff that she refused consent.

[para 160] As I said, the opt-out in the Form does not satisfy section 34(2) of HIA. The tick box does not meet any of the six criteria that are set out in that provision. In particular, under section 34(2) of HIA, the opt-out box on the Form does not specify what information can be disclosed, describe the purpose for which the information can be disclosed, describe the identity of the person to whom the information may be disclosed, provide an acknowledgment, provide the date the consent is effective or provide a statement that the consent may be revoked at any time.

[para 161] All of the above considerations point towards a finding that Dr. L. did not have authority to disclose the health information pursuant to consent under section 34 of HIA. In my view, the Complainant discharged the initial burden to show that disclosure occurred, but Dr. L. did not discharge the burden of proving that any disclosure was authorized by consent under section 34 of HIA. Therefore, I find that Dr. L. does not have authority to disclose the individually identifying health information under section 34 of HIA (disclosure permitted with consent).

Section 35

[para 162] The Complainant did not make a specific submission about whether any of her health information was "diagnostic, treatment and care information" under section 35 of HIA. Dr. L. says that section 35 is not relevant and does not apply to the circumstances of this case, because there is no "diagnostic, treatment and care information", as defined in HIA. Dr. L. also says that individually identifying health information was not disclosed, and alternatively if there was any disclosure, there was authority for the disclosure pursuant to consent.

[para 163] I said that the Database may contain the Complainant's "diagnostic, treatment and care information", as defined in HIA. Section 35 of HIA permits custodians to disclose individually identifying "diagnostic, treatment and care information" without consent when the circumstances fall within the list of specified circumstances. The corollary is that section 35 of HIA does not permit custodians to disclose any "diagnostic, treatment and care information" without consent for purposes that are not specified in section 35 of HIA.

[para 164] Section 35(1)(a) of HIA permits custodians to disclose "diagnostic, treatment and care information" without consent to another custodian for section 27(1) purposes such as providing health services (section 27(1)(a)). Section 35(1)(b) of HIA permits custodians to disclose "diagnostic, treatment and care information" without consent to a person who is responsible for providing continuing treatment and care to the individual.

[para 165] None of the circumstances under section 35 of HIA that authorize the disclosure of "diagnostic, treatment and care information" without consent apply in the circumstances of this case. In my view, Dr. L. did not have authority to disclose any "diagnostic, treatment and care information" without consent under section 35 of HIA. Therefore, Dr. L. has not discharged the burden of proving that any disclosure of "diagnostic, treatment and care information" without consent was authorized by section 35 of HIA.

[para 166] For all of the above reasons, I find that Dr. L. did not have authority to disclose any "diagnostic, treatment and care information" to Corona or the Foundation either with consent under section 34 or without consent under section 35 of HIA (disclosure permitted without consent in specified circumstances).

Section 36

[para 167] The Complainant did not make a specific submission about whether her health information consisted of "registration information". Dr. L. says that section 36 of HIA is not relevant to the facts of this case because "section 36 deals with disclosure without consent". Dr. L. takes the position that any disclosure of the registration information of Clinic patients in the Database was authorized under HIA, as the disclosure was made under the authority of consent.

[para 168] Similar to the exceptions to consent that are set out for "diagnostic, treatment and care information" in section 35, section 36 of HIA permits custodians to disclose individually identifying "registration information" without consent in specified circumstances. Section 36(a) of HIA authorizes disclosure of "registration information" without consent for section 35(1) HIA purposes that include providing health services (section 35(1)(a) and section 27(1)(a)) and to a person who is responsible for providing continuing treatment and care to the individual pursuant to section 35(1)(b).

[para 169] I agree with Dr. L that the Complainant's health information in the Database includes "registration information", as defined in section 1(1)(u) of HIA. However, Dr. L. says that section 36 of HIA is not relevant and does not apply to authorize disclosure of the Complainant's "registration information" without consent. Dr. L. says that first, there was no disclosure of any registration information, or second, there was consent to any "registration information" that was disclosed.

[para 170] In my view, Dr. L. did not discharge the burden of proving that there was authority to disclose any "registration information" without consent under section 36 of HIA. Therefore, Dr. L. requires consent under section 34 to disclose the registration information. I have already found that Dr. L. did not meet the criteria for consent under section 34 of HIA. For all of the above reasons, I find that Dr. L. did not have authority to disclose any "registration information" to Corona or to the Foundation under either section 34 with consent or under section 36 of HIA (disclosure permitted without consent in specified circumstances).

[para 171] Section 31 of HIA prohibits a custodian from disclosing individually identifying health information, except in accordance with HIA. In my view, Dr. L. has not discharged the burden of proving that any disclosure was in accordance with section 31 of HIA. Given my findings under section 34, section 35 and section 36 of HIA, I find that Dr. L.'s disclosure of health information for purposes of marketing and soliciting for fundraising was not in accordance with, and therefore was in contravention of, section 31 of HIA (no disclosure except in accordance with HIA).

Summary

In summary, this Order finds that:

1. There is no authority under HIA for a custodian to collect an individual's health information for the purpose of marketing or soliciting for fundraising. There is no provision under HIA for an individual to consent to a custodian collecting the individual's health information for the purpose of marketing or soliciting for fundraising;

2. There is no authority under HIA for a custodian to use an individual's health information for the purpose of marketing or soliciting for fundraising. There is no provision under HIA for an individual to consent to a custodian's using the individual's health information for the purpose of marketing or soliciting for fundraising; and

3. There is authority under HIA for a custodian to disclose an individual's health information for the purpose of marketing or soliciting for fundraising, but only if the custodian has the individual's consent. Consent must meet the requirements of section 34(2) of HIA. The person to whom the individual's health information is disclosed must also have the individual's consent to use the individual's health information for the purpose of marketing and soliciting for fundraising. Use by that person, without consent, is an offence under section 107(2)(f) of HIA.

Comment

[para 172] The Database pertains to approximately 10,000 patients along with another 5,000 non-patients. Dr. L. says that the four mailings mean that although about 59,000 letters were sent, there were only four individuals that complained. On the other hand, this is not the only complaint about the Database, as there was a previous complaint. Additionally, there are nine inquiries pertaining to the Database. There is no way of knowing whether other individuals have similar concerns about the issues before the Inquiry, but are unable or unwilling to complain.

[para 173] HIA prescribes the duties of custodians for health information. Dr. L.'s submissions describe "major changes" that are new practices or systems at the Clinic as well as changes to existing administrative practices and information systems that pertain to the Database that may affect the privacy of the individuals who are the subjects of that information. These types of changes trigger a mandatory duty for a custodian to submit a privacy impact assessment ("PIA") to the Office under section 64 of HIA. In my view, PIAs can be an effective way for custodians to achieve compliance with HIA.

[para 174] HIA authorizes a decision-maker to issue an order requiring the destruction of health information that is collected or created in contravention of HIA (section 80(3)(f)). I have considered whether to issue a destruction order for the Database in the circumstances of this case. I have considered the stated primary purpose for the Database, which is the provision of health services to Clinic patients. For that reason, I have decided against issuing a destruction order.

[para 175] Instead, I intend to order Dr. L. to comply with the duty under HIA to prepare a privacy impact assessment and to stop collecting, using and disclosing health information for purposes of marketing and soliciting for fundraising under HIA.

VII. ORDER

[para 176] I make the following Order under section 80 of HIA:

- I find that:

  - ISSUE A: The "Custodian" "collected", "used" and "disclosed "individually identifying" "health information" of the Complainant as these terms are defined in HIA;

  - ISSUE B: The Custodian did not have authority to collect the Complainant's health information for purposes of marketing and soliciting for fundraising under section 20 of HIA (collection permitted in specified circumstances), and more particularly, did not have authority to collect the health information under section 20(b) of HIA;

  - ISSUE C: The Custodian collected the Complainant's health information for purposes of marketing and soliciting for fundraising in contravention of section 18 of HIA (no collection except in accordance with HIA);

  - ISSUE D: The Custodian did not have authority to use the Complainant's health information for purposes of marketing and soliciting for fundraising under section 27 of HIA (use permitted in specified circumstances), and more particularly, did not have authority to use the health information under section 27(1)(a) of HIA;

  - ISSUE E: The Custodian used the Complainant's health information for purposes of marketing and soliciting for fundraising in contravention of section 25 of HIA (no use except in accordance with HIA);

  - ISSUE F: The Custodian did not have authority to disclose the Complainant's health information for purposes of marketing and soliciting for fundraising under section 34 of HIA (disclosure permitted with consent), and more particularly, did not have authority to disclose the health information under section 34(2) of HIA;

  - ISSUE G: The Custodian did not have authority to disclose any of the Complainant's "diagnostic, treatment and care information" for purposes of marketing and soliciting for fundraising under section 35 of HIA (disclosure permitted without consent in specified circumstances), and more particularly, did not have authority to disclose the health information under section 35(1)(a) and section 35(1)(b) of HIA;

- ISSUE H: The Custodian did not have authority to disclose any of the Complainant's "registration information" for purposes of marketing and soliciting for fundraising under section 36 of HIA (disclosure permitted without consent in specified circumstances), and more particularly, did not have authority to disclose the health information under section 36(a) of HIA;

- ISSUE I: The Custodian disclosed the Complainant's health information for purposes of marketing and soliciting for fundraising in contravention of section 31 of HIA (no disclosure except in accordance with HIA);

- ISSUE J: Neither party has the burden of proof for the definitional issues (custodian, collect, use, disclose, individually identifying, health information);

- ISSUE K: The Custodian has the burden of proving that any collection was in accordance with section 20 and section 18 of HIA;

- ISSUE L: The Custodian has the burden of proving that any use was in accordance with section 27 and section 25 of HIA; and

- IISUE M: The Custodian has the burden of proving that any disclosure was in accordance with section 34, section 35 or section 36, whichever applies, and with section 31 of HIA.

[para 177] Pursuant to section 80 of HIA, I order the Custodian to:

- Submit a privacy impact assessment for the health information in the Database, within 50 days of receiving a copy of this Order;

- Stop collecting, using and disclosing the health information in the Database for purposes of marketing and soliciting for fundraising in contravention of HIA; and

- Notify me within 50 days of receiving a copy of this Order that it has complied with the terms of this Order.

Noela Inions, Q. C.
Adjudicator