

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER H2007-003

January 22, 2008

**DR. BARRY LYCKA**

Case File Number H1325

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

**Summary:** The Complainant received medical treatment several years ago from her doctor, Dr. Barry Lycka ("Dr. L." or "Custodian"), at a physician office clinic ("Clinic"). In 2006, the Complainant received four letters soliciting for fundraising for the Canadian Skin Cancer Foundation ("Foundation") from Dr. L., through the Dr. Barry Lycka Professional Corporation ("Professional Corporation").

The complaint pertains to only one of the four letters, which the Complainant describes as being "offensive and very irritating" as well as "intimidating and aggressive". An excerpt from the letter that is the subject of the complaint, 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 am writing again to make sure you still have a heartbeat."

Dr. L. created a mailing list ("Database") that includes the individuals who were patients at the Clinic. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The issues of whether Dr. L. contravened the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") by collecting, using and disclosing the Complainant's health information for purposes of soliciting for fundraising were set down for a written inquiry ("Inquiry").

The Inquiry was held in conjunction with an inquiry for Case File Number P0481, which resulted in Order P2007-008 that involves the same Complainant the Foundation under the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA"). Dr. L. is involved in two other inquiries for Case File Numbers H1284 and H1331, which resulted in Order H2007-001 and Order H2007-004.

The Foundation is involved in inquiries for Case File Numbers P0494, P0490 and P0489, which resulted in Orders P2007-007, P2007-009 and P2007-012.

The Endermologie Centre Corporation (trade name is Corona) is involved in an inquiry under Case File Number P0493, which resulted in Order P2007-006. 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 the complaint made by the Complainant was excluded from the application of HIA as the complaint does not pertain to the collection, use or disclosure of the Complainant's health information under HIA. Given the above finding, she did not have authority to decide any further issues at the Inquiry.

**Orders Cited: AB: HIA:** Orders: H2007-004, H2007-001; **AB PIPA:** P2007-012, P2007-011, P2007-009, P2007-008, P2007-007, P2007-006.

**Statutes Cited:** *Health Information Act*, R.S.A. 2000, c. H-5, ss. 18, 20, 25, 27, 28, 31, 34, 35, 36, 80; *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

## I. BACKGROUND

[para 1] The Complainant received medical treatment several years ago from her doctor, Dr. Barry Lycka ("Dr. L." or "Custodian"), at a physician office clinic ("Clinic"). In 2006, the Complainant received four letters soliciting for fundraising for the Canadian Skin Cancer Foundation ("Foundation") from Dr. L., through the Dr. Barry Lycka Professional Corporation ("Professional Corporation").

[para 2] The complaint pertains to only one of the letters, which the Complainant describes as being "offensive and very irritating" as well as "intimidating and aggressive". An excerpt from 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 am writing again to make sure you still have a heartbeat.

[para 3] Dr. L. created a mailing list ("Database") that includes the individuals who were patients at the Clinic. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa ("Corona") and the Foundation. The issues of whether Dr. L. contravened the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") by collecting, using and disclosing the Complainant's health information for purposes of soliciting for fundraising were set down for a written inquiry ("Inquiry").

[para 4] 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 that were exchanged between the parties. The Complainant requested anonymity, so her name was removed before submissions were exchanged.

[para 5] The Inquiry was held in conjunction with an inquiry for Case File Number P0481, which resulted in Order P2007-008 that involves the same Complainant 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 for the two concurrent inquiries.

[para 6] Dr. L. is involved in two other inquiries for Case File Numbers H1284 and H1331, which resulted in Order H2007-001 and Order H2007-004. The Foundation is involved in three other inquiries for Case File Numbers P0494, P0490 and P0489, which resulted in Orders P2007-007, P2007-009 and P2007-012.

[para 7] The Endermologie Centre Corporation (trade name is Corona) is involved in an inquiry under Case File Number P0493, which resulted in Order P2007-006. The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011. The respondents provided the same written initial submission for seven of the inquiries. There are a total of nine inquiries pertaining to the Database.

## II. RECORDS/INFORMATION

[para 8] 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 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 9] 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 10] 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 11] The Inquiry pertains only to collection, use and disclosure of health information for purposes of 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.

[para 12] As the Complainant submitted the same written initial submissions for the two concurrent inquiries, this Order will provide the more complete version of the Complainant’s facts, evidence and argument. The more complete version of Dr. L.’s facts, evidence and argument is provided in Order H2007-001. That information will not be repeated in this Order.

#### IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

##### *The patient complainant*

[para 13] In her initial written submission, the Complainant describes the focus of her complaint, as follows:

I believe the writer of the letter showed very poor taste in soliciting in this manner but also, it was disturbing for a medical office to make light of the dead or dying by saying “to make sure you still have a heart beat”.

[para 14] The Complainant provided a copy of the complaint she made to the Commissioner’s Office in her initial written submission, which is as follows:

I wish to register a complaint regarding the attached letter that was the third of three letters sent to my home from the staff at Dr. Lycka’s office. I did not save the first two letters which I remember indicating something like since I was a prior patient of Dr. Lycka’s I would certainly like to attend and support his 50<sup>th</sup> birthday party. I believe they indicated that the amount that was expected from me was somewhere around \$100. I remember thinking that these requests were inappropriate but felt that ignoring the letters would make the point that I was not interested. ...

I was prepared to ignore the requests for funding but the third letter (attached) caused me great concern. It appeared to be intimidating and aggressive: *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 am writing again to make sure you still have a heartbeat. I found this offensive and very irritating.*

[para 15] In her initial written submission, the Complainant attached a copy of the letter she was complaining about, which reads:

*Disappointed  
and  
saddened  
am  
I...*

Dear <first name>

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.

The event is **THE SPRING GALA** for the **Canadian Skin Cancer Foundation**. There will be draws for **A TRIP TO LAS VEGAS** (and you have a chance of at least 1/500 of winning). **A BIG SCREEN TELEVISION** (again a 1/500 CHANCE - wouldn't it have been nice to watch the "Oil" win the Stanley cup on your own home entertainment center?), door prizes and gift certificates for Corona Rejuvenation Center and Spa.

Remember, we have a great lineup of entertainment for you ...

The best part of the evening will be the special tribute to Dr. Lycka in celebration of his 50<sup>th</sup> birthday. This of course, is our '**TOP SECRET' Operation Old Buzzard** surprise part of the program, and one that we don't want you to miss. (Please don't tell the old buzzard - it's a surprise!)

Please help us reach our goal of 1000 tickets so that we can present Dr. Lycka with the greatest gift of all - a nice big cheque for the **CSCF**! There is nothing that would please him more.

We know how many people he has helped over the last twenty years or so - tens of thousands to be exact - and how passionate he is about the cause. Instead of just being able to help people with their skin problems and cancers, we want to help to fulfill his dream of detection and prevention of skin cancer through awareness and education.

**THE ONLY WAY WE CAN DO THIS IS TO RAISE THE MUCH NEEDED FUNDS!!!**

Please show your support and call us **TODAY** at (780) 423-CSCF (2723) to order your tickets.

[first and last name of individual who is Controller of the Professional Corporation]

### *The physician custodian*

[para 16] Dr. L.'s written submissions describe the development of the Database and the evolution of the relationships among Dr. L., the Clinic, the Professional Corporation, the Foundation, Corona and Endermologie Centre Corporation ("Endermologie").

[para 17] Dr. L. says that the Database was established in 2000, but "major changes" were subsequently made. In 2004, a new Patient History 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 18] 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.

[para 19] Dr. L. says the four 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 20] Dr. L.’s initial written submission says:

The first letters used humour to get the attention of the recipients. There was some feedback that some individuals were offended by some of the content of the letter, and therefore the last letter contained an apology.

[para 21] Dr. L.’s initial written submission contains ten tabs and a “Table of Authorities”. The tabs that pertain to the Inquiry are as follows:

- *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 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 8: Letters re: Party for Dr. Lycka*
  - *First letter (Dr. L./Professional Corporation)* – This four-page package 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 26<sup>th</sup> 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.

[para 22] Dr. L. takes the position that HIA was not contravened in the mailings. Dr. L. says the Clinic patients with information in the Database consented to the collection, use and disclosure of health information for purposes of 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 the Office.

## V. DISCUSSION OF PRELIMINARY ISSUES

### *Anonymity*

[para 23] 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. The Complainant requested anonymity in these proceedings because she is Dr. L.’s patient.

[para 24] This Order takes the same approach to this issue as Orders H2007-001, H2007-004, P2007-006, P2007-007 and P2007-009, as well as Order P2007-008, which pertains to the same Complainant. These Orders all pertain to Clinic patients of Dr. L. who requested anonymity during the inquiry proceedings. I accept that it is the Complainant’s perception that disclosing her identity to Dr. L. in these proceedings could compromise her ability to obtain health services. In my view, the Complainant has provided a sufficient reason for anonymity in these proceedings.

### *Non-inquiry issue*

[para 25] The letter that the Complainant provided as the subject of her complaint (also the second letter under Tab 8 in Dr. L.’s initial submission) begins, “[D]isappointed and saddened am I”... 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 26] The Complainant says:

I wish to register a complaint regarding the attached letter that was the third of the three letters sent to my home from the staff at Dr. Lycka's office. ... I was prepared to ignore the requests for funding but the third letter (attached) caused me great concern. It appeared to be intimidating and aggressive: *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 am writing again to make sure you still have a heartbeat.* I found this offensive and very irritating.

[para 27] Dr. L.'s initial written submission says:

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 28] The Complainant describes the above letter, which is the sole focus of the complaint before me, as being "intimidating and aggressive" and as "offensive and very irritating". These are not matters that relate to the Inquiry issues or that fall within the scope of HIA. I do not have the authority at the Inquiry to consider matters that fall outside of the complaint that was made by the Complainant or that fall outside of HIA.

[para 29] I accept Dr. L.'s submission that whether this letter is "insulting and in poor taste" is not relevant to the Inquiry. This Order takes the same approach to this issue as Orders H2007-001, H2007-004, P2007-006, P2007-007, P2007-009, P2007-011 and P2007-012, as well as Order P2007-008, which pertains to the same Complainant. I said that whether the letters were "insulting and in poor taste" was not relevant to the HIA issues that were before me at the Inquiry.

[para 30] However in contrast to these other cases, the entirety of the complaint made by the Complainant relates to non-inquiry issues.

## VI. DISCUSSION OF INQUIRY ISSUES

[para 31] My jurisdiction at the Inquiry and the scope of this Order are restricted to the collection, use and disclosure issues that fall under HIA. However these are not the kinds of things that the Complainant complained about. The Complainant did not complain about any of the collection, use and disclosure issues that are before me at the Inquiry or that fall under the scope of HIA. For these reasons, I find that I do not have jurisdiction to decide the Inquiry issues as they do not relate to the complaint. It follows that I also do not have authority to decide any of the above Inquiry issues.

[para 32] This finding does not mean that there is no appropriate forum in which to address the issues that the Complainant raises. In fact, the complainant in Orders P0482 and P0489 pursued the matter with the College of Physicians and Surgeons of Alberta. My finding that this complaint does not fall under the scope of HIA is not a matter of

whether I agree or disagree with the Complainant, but rather a matter of whether the issues raised fall within my authority and jurisdiction at the Inquiry.

## **VII. ORDER**

[para 33] I make the following Order under section 80 of HIA:

- I find that:
  - The complaint made by the Complainant is excluded from the application of HIA as the complaint does not pertain to the collection, use or disclosure of the Complainant's health information under HIA; and
  - Given the above finding, I do not have authority to decide any further issues at the Inquiry.

Noela Inions, Q. C.  
Adjudicator