

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER H2007-004

January 25, 2008

DR. BARRY LYCKA

Case File Number H1331

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 the "Custodian"), at a physician office clinic ("Clinic"). In 2006, the Complainant received four pieces of correspondence pertaining to soliciting for fundraising from Dr. L., through the Dr. Barry Lycka Professional Corporation ("Professional Corporation"), on behalf of the Canadian Skin Cancer Foundation ("Foundation").

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 Complainant said 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 soliciting for fundraising. The matter was set down for a written inquiry ("Inquiry").

The Inquiry was held in conjunction with an inquiry for Case File Number P0490, which resulted in Order P2007-009 and that involves the same Complainant and the Foundation under the *Personal Information Protection Act*, S.A. 2003, c. P-6.5. Dr. L. is involved in two other inquiries for Case File Numbers H1284 and H1325, which resulted in Order H2007-001 and Order H2007-003. The Foundation is involved in three other inquiries for Case File Numbers P0494, P0481 and P0489, which resulted in Orders P2007-007, P2007-008 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:

- 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” “used” and “disclosed” “individually identifying” “health information”, as these terms are defined in HIA;
- HIA does not apply to the Custodian’s collection of health information for purposes of soliciting for fundraising under section 20 of HIA (collection permitted in specified circumstances), or to the Custodian’s authority to collect the health information under section 20(b) of HIA;
- HIA does not apply to the Custodian’s collection of health information for purposes of soliciting for fundraising in accordance with section 18 of HIA (no collection except in accordance with HIA);
- The Custodian did not have authority to use health information for purposes of 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 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 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;
- There is no information to consider under section 35 of HIA (disclosure permitted without consent in specified circumstances), as the complaint did not pertain to “diagnostic, treatment and care information” under section 35 of HIA;
- The Custodian did not have authority to disclose any “registration information” for purposes of 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 soliciting for fundraising in contravention of section 31 of HIA (no disclosure except in accordance with HIA).

The Adjudicator ordered the Custodian to:

- Stop using and disclosing health information for purposes of soliciting for fundraising in contravention of HIA; and
- Submit a privacy impact assessment (“PIA”) for the health information in the Database, which could be done conjointly with the PIA for Order H2007-001.

Bottom Line: HIA does not apply to the Custodian’s collection of the Complainant’s health information for purposes of soliciting for fundraising, as the health information was collected before HIA came into force;

There is no authority under HIA for a custodian to use an individual’s health information for the purpose of 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 soliciting for fundraising; and

There is authority under HIA for a custodian to disclose an individual’s health information for the purpose of 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 soliciting for fundraising. Use by that person, for purposes of soliciting for fundraising without consent, is an offence under section 107(2)(f) of HIA.

Orders Cited: AB HIA: Orders: H2007-003, H2007-001; **AB PIPA:** P2007-012, P2007-011, P2007-009, P2007-008, P2007-007 and P2007-006.

Statutes Cited: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1), 1(1)(f), 1(1)(f)(ix), 1(1)(k), 1(1)(k)(iii), 1(1)(m), 1(1)(m)(i), 1(1)(n), 1(1)(p), 1(1)(u), 1(1)(w), 2, 5(1), 5(2), 18, 20, 25, 27, 31, 34, 35, 36, 64, 80, 80(3)(a), 80(3)(e), 107(2)(f); *Health Information Regulation*, A.R. 70/2001, ss. 3(a)(i), 3(b)(i); *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

I. BACKGROUND

[para 1] The Complainant received medical treatment several years ago before HIA came into force, from her doctor, Dr. Barry Lycka (“Dr. L.” or the “Custodian”), at a physician office clinic (“Clinic”). In 2006, the Complainant received four pieces of correspondence pertaining to soliciting for fundraising from Dr. L., through the Dr. Barry Lycka Professional Corporation (“Professional Corporation”), on behalf of the Canadian Skin Cancer Foundation (“Foundation”).

[para 2] In 2000, Dr. L. created a mailing list (“Database”) that includes the contact information of individuals who were patients at the Clinic. Dr. L. shares the Database with the Corona Rejuvenation Centre & Spa (“Corona”) and the Foundation. The Complainant said 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 soliciting for fundraising. The matter was set down for a written inquiry (“Inquiry”).

[para 3] 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 the Complainant provided a written rebuttal submission, which was exchanged between the parties. The Complainant also provided an *in camera* rebuttal submission. The Complainant requested anonymity, so her name was removed before her submissions were exchanged.

[para 4] The Inquiry was held in conjunction with an inquiry for Case File Number P0490, which resulted in Order P2007-009 and that involves the same Complainant and the Foundation under the *Personal Information Protection Act*, S.A. 2003, c. P-6.5. Dr. L. is involved in two other inquiries for Case File Numbers H1284 and H1325, which resulted in Order H2007-001 and Order H2007-003. The Foundation is involved in three other inquiries for Case File Numbers P0494, P0481 and P0489, which resulted in Orders P2007-007, P2007-008 and P2007-012.

[para 5] The Endermologie Centre Corporation (trade name is Corona) is involved in an inquiry for 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 6] 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 7] 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 8] 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 9] 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 10] The Complainant submitted the same written submissions for the concurrent inquiries that include Order P2007-009, so 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. For the most part, that information will not be repeated in this Order.

IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

The patient complainant

[para 11] In her initial written submission, the Complainant summarized the facts as follows:

In March 2006, I received a letter from [name of individual] in Dr. Barry Lycka's office. The letter stated that I had been a patient of Dr. Lycka's within the past two years and have been helped with a health problem. It stated that Dr. Lycka will be 50 years old this year, and that I was invited to attend a surprise celebration in his honor. Details of the celebration were included with the letter in a separate envelope marked "Top Secret".

On two separate dates in May 2006, I received two more pieces of correspondence from Dr. Lycka's office, a card and a letter reminding me of the event.

In June 2006, I received a letter a letter [sic] from the Canadian Skin Cancer Foundation, signed by [name of individual], Office Manager, and listing Dr. Barry Lycka as a signatory (his signature does not appear on the letter). It apologizes to anyone who was offended by the content of the letter and states that this was not the intention. However, it requests that I reconsider the invitation and purchase a ticket, since I had not responded to the previous reminders.

My personal contact information as a patient in Dr. Lycka's office was used to invite me to a personal celebration for this physician. My contact with this physician and his staff has only ever been on a professional level as a patient.

[para 12] In her written initial submission, the Complainant said:

Burden of Proof under the Health Information Act

- With respect to Issue #1, I believe that the Dr. Barry Lycka Professional Corporation used and then disclosed "individually identifying" health information to the Canadian Skin Cancer Foundation. The health information included use and disclosure of my name and home address to the Canadian Skin Cancer Foundation for solicitation for fundraising. I am not aware if any medical information was disclosed, but I have no reason to believe that information other than my name and home address were disclosed.
- The Dr. Barry Lycka Professional Corporation did not request nor obtain my consent to use or disclose my health information to the Canadian Skin Cancer Foundation for any purpose.

[para 13] The Complainant summarized the four pieces of correspondence that she received, as follows:

March 2006

- Outside envelope. My name and home address have been blacked out.
- Letter from [name of individual], Controller, Dr. Barry Lycka Professional Corporation, dated March 2006.
- Envelope labeled "Top Secret" – This was included in the outer envelope with the March 2006 letter above.
- Three pages of details outlining the event referred to as "Operation Old Buzzard".

May 2006

- Outside envelope. My name and home address have been blacked out.
- A two-sided card reminding me of the upcoming event.

May 2006

- Outside envelope. My name and home address have been blacked out.
- A letter from [name of individual] as another reminder to attend the event.

June 2006

- Outside envelope. My name and home address have been blacked out.
- A letter from the Canadian Skin Cancer Foundation, listing [name of individual] and Dr Larry Lycka as signatories. Only [name of individual's] signature appears on the letter.

[para 14] In her written initial submission, the Complainant provided copies of the four pieces of correspondence that she received, together with the envelopes, which are as follows:

- *First correspondence: March 2006 (Dr. L./Professional Corporation)* – This four-page package from the Professional Corporation to the Complainant, consists of a covering letter and a three-page attachment that begins, "Dear Friend". The letter says, "I am writing to you 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." The letter has the signature and typewritten name of the individual who is the Controller of the Professional Corporation. The Complainant blocked out her name and mailing address on the envelope.
- *Second correspondence: Undated (Dr. L./Professional Corporation)* – This two-sided card reads, "[S]how your support for the Canadian Skin Cancer Foundation" and "If you haven't bought your ticket – what are you waiting for??." The Complainant blocked out her name and mailing address on the envelope.
- *Third correspondence: Undated (Dr. L./Professional Corporation)* – This single page letter is addressed by first name, "[D]isappointed and saddened am I". The first paragraph 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."
- The last paragraph reads, "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." The bottom of this letter has the same typewritten name of the same

individual who signed the first correspondence of March 2006. The Complainant blocked out her name and mailing address on the envelope and her name in the letter.

- *Fourth correspondence: June 14, 2006 (Foundation)* - This single page letter appears to be addressed to the Complainant 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 contains the signature and typewritten name and title of the Office Manager of the Foundation as well as the typewritten name of Dr. Barry Lycka, FRCP, Canadian Skin Cancer Foundation. The Complainant blocked out her name and mailing address on the envelope and her name and address inside the letter.

[para 15] The parts of the Complainant's written rebuttal submission that pertain to HIA as well as to general argument, are as follows:

Health Information Act

25(d) states that "all patients received consent forms". *I was not given a consent form.* 25(b) states that changes were made to the forms in 2004 as the act was coming into effect, and 28 states that "there are mechanisms in place for updating information for patients who had started with the clinic prior to" the change in legislation. *I was a patient in the clinic prior to 2004 and have not been in the clinic since for my consent to be obtained according to these processes.*

25(e) and (f) state that consent was also obtained "when individuals attended a lecture or seminar", or "registered at Corona". *I have not attended any lectures or seminars nor visited the Corona facility, so consent could not have been obtained through this process.*

32 states that "there may be some names in the database who have not given permission to be on the mailing list", as the names may have been there before the PIPA and HIA came into effect. *I would agree that this is likely the case in my circumstances.*

42(d) refers to the Patient History Form. *I did not provide consent using this Patient History Form, as likely I was a patient before this form was used by Dr. Lycka.*

42(e) and (f) refers to consent forms used by the Canadian Skin Cancer Foundation and the Endermologie Centre Corporation. *Since I have had no contact with the Canadian Skin Cancer Foundation nor the Endermologie Centre Corporation, consent was not obtained in this manner.*

42(g) and 43 refer to procedures to update client databases, and that likely an error in entering information into the database may have occurred. *Although there are procedures for updating the database, I have not been into the clinic since the changes to the PIPA and HIA came into effect. My consent cannot be assumed to be provided. However, it is possible that an error occurred.*

46 states that “the Respondents argue the use of this information was with consent.” *I did not provide consent.*

47 states that the use of names and addresses were “also with consent of the individual who provided the information.” *I did not provide consent.*

48 states that the HIA “allows the disclosure to a third party of health information with consent. This information was not disclosed to a third party.” *I provided my health information to Dr. Barry Lycka, not to the Organizations. Consent was not given to be added to the mailing list. My information was shared with a third party.* In #13, it states that the Canadian Skin Cancer Foundation “operates separately from the Clinic, the Professional Corporation and Corona”. In #18, it states that the “Respondent entities are related but separate organizations”, and that “each entity has their own method of obtaining consent”. *My information was provided to Dr. Lycka for the purposes of treatment. If the Custodian and the Organizations are separate entities, and each obtains their own consent, how did the Canadian Skin Cancer [sic] obtain my information unless Dr. Lycka shared his database with a third party, the Canadian Skin Cancer Foundation?*

50 states that “the recipients of the letters were receiving their own information”. As stated in the rebuttal to #48 above, the Canadian Skin Cancer Foundation, the Clinic, the Professional Corporation and Corona all operate independently. *I may have received my own information, but it was given to the Canadian Skin Cancer Foundation from Dr. Barry Lycka.*

51 concedes that “there may have been a few patients who may not have consented as they were patients prior to the enactment of HIA”, and that every “reasonable effort” was made to “ensure only those who consented” were on the database. *It appears that processes were in place, but I was missed.*

52 states that the Respondents “were authorized by way of the consents”, and that there was “explicit consent”. *I did not provide consent, and if I am one of the patients that the Respondents refer to in #51 that did not consent, then my consent cannot be assumed.*

53(a) states that the information was “not given to a third party” and that it was “sent back to the individual”¹ [sic]. *My information was provided to Dr. Barry Lycka, who in turn, provided it to the Canadian Skin Cancer Foundation. The Foundation is the third party as I stated in the rebuttal to #48 above.*

53(b) states that “there was consent”. *I did not provide consent.*

54 states that the Respondents will remove the names of the complainants. *I will consider this.*

Content of the Mailing

72 and 73 states that the content of the letters is not relevant to this inquiry. *I agree that the content is not relevant. My complaint did not comment on this.* However, #73 states that the “Respondents believe the recipients of the 59,000 [sic] all voluntarily asked for further information to be sent to them.” *I did not provide consent.*

Summary

76(a) states that the “information was collected properly” and 76(b) states that procedures were in place to ensure consents were obtained.” *I did not provide consent and the process did not work in my situation.*

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 (“Form”) was developed, which patients completed when they returned to the Clinic. Dr. L. says the Database was updated, which included information obtained 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 that approximately 59,000 letters were sent out in four mailings, 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 first eight tabs pertain to evidence, which are:

- *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 this 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 to check off the box to receive the Corona Newsletter.

- *Tab 7: Chart Pulling Procedures (Dr. L./Clinic)* - These two pages are procedures at the Clinic that pertain to implementing the opt out or “No” for patient charts, pursuant to Question #40 on the Form. 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: April 2006 (Dr. L./Professional Corporation)* - This four-page package is almost identical to the March 2006 letter that was provided as the first piece of correspondence in the Complainant’s submission. However, this letter has a different date and the second paragraph reads differently as follows, “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: Undated (Dr. L./Professional Corporation)* - This single page letter is identical to the fourth piece of correspondence in the Complainant’s initial submission. This letter is addressed to recipient by first name and says, “[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: June 2006 (Foundation)* - This single page letter is identical to the fourth piece of correspondence in the Complainant’s initial submission. This letter is addressed to recipient 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.

[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.

Dr. L. concedes that some Clinic patients may have come to the Clinic before the new Form was developed in 2004, and may not have returned to complete the Form.

[para 23] Although nothing substantive turns on these discrepancies, I note that Dr. L.'s description of when the mailings occurred varies from the evidence provided by the Complainant. For example, the Complainant says that she received the first piece of correspondence in March of 2006, whereas Dr. L. says the first mailing occurred on April 10, 2006. I accept the Complainant's version of the facts as to when the correspondence was received. The Complainant provided the more detailed evidence, with copies of the actual correspondence and envelopes received.

V. DISCUSSION OF PRELIMINARY ISSUES

Anonymity

[para 24] 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 25] This Order takes the same approach to this issue as Orders H2007-001, H2007-003, P2007-006, P2007-007 and P2007-008, as well as Order P2007-009, 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 26] Dr. L. says:

72 The Complainants found the content of the letter to be insulting and in poor taste. That is not relevant to this inquiry.

73 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 27] The Complainant's written rebuttal submission says:

72 and 73 states that the content of the letters is not relevant to this inquiry. I agree that the content is not relevant. *My complaint did not comment on this.*

[para 28] I accept the argument of the parties that whether a letter was "insulting and in poor taste" is not relevant to the Inquiry. This Order takes the same approach as

Orders H2007-001, H2007-003, P2007-006, P2007-007, P2007-008, P2007-011 and P2007-012, as well as Order P2007-009, which pertains to the same Complainant. I said that whether a letter was “insulting and in poor taste” was not relevant to the issues before me at the Inquiry.

[para 29] My jurisdiction at the Inquiry and the scope of this Order are restricted to the use and disclosure issues at the Inquiry, as those issues pertain to Dr. L. under HIA. Section 80 allows me to issue an Order that requires a custodian to perform a duty imposed by HIA such as preparing a privacy impact assessment (section 80(3)(a)) or that requires a custodian to stop using or disclosing health information in contravention of HIA (section 80(3)(e)).

VI. DISCUSSION OF INQUIRY ISSUES

[para 30] This Order will first address the matters pertaining to burden of proof that are 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.

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 DISCLOSURE WAS IN ACCORDANCE WITH SECTION 34, SECTION 35 OR SECTION 36, WHICHEVER APPLIES, AND WITH SECTION 31 OF HIA?

[para 31] This Order takes the same approach to burden of proof as Order H2007-001. 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 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 the definitional matters in Issue A.

[para 32] 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, used and 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 collection, use and disclosure is in accordance with HIA. Therefore, I find that the Complainant has the initial burden and Dr. L. has the further burden of proof under Issues B, C, D, E, F, G, H and I, to show that any collection, use and disclosure was in accordance with sections 18, 20, 25, 27, 31, 34, 35 and 36 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 33] 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 34] Section 1(1) of HIA, under the heading of “Interpretation”, 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 35] The information that the Complainant complained about was her name and mailing address. Dr. L. said that the Database contains names, phone numbers, addresses, gender and services requested, and therefore, contains “individually identifying” information as defined under section 1(1)(p) of HIA. The parties do not dispute that the information is “individually identifying”.

[para 36] As in Order H2007-001, I accept the submissions 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. I find that the information in the Database is “individually identifying”, as defined under section 1(1)(p) of HIA.

Health Information

[para 37] The relevant parts of the definitions pertaining to “health information” under HIA are as follows:

1(1)(k) “health information” means any or all of the following:

(iii) registration 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, ...;

(ii) location information;

(iv) residency information; ...

but does not include information that is not written, photographed, recorded or stored in some manner in a record.

[para 38] 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 ...;

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

(i) home ... mailing addresses.

[para 39] The Complainant did not explicitly address whether the information about her in the Database falls within the definition of “health information”, although she says that Dr. L. breached HIA in the use and disclosure of her name and mailing address. The Complainant says that her only contact with Dr. L. was “on a professional level as a patient”.

[para 40] Dr. L. says that the information in the Database is name, phone number, mailing address, gender and services requested. Dr. L. says that the Database contains “registration information”, which is “health information” under HIA. Dr. L. concedes that “health information” is defined very broadly under HIA.

Registration information

[para 41] HIA defines “registration information” to include an individual’s name and mailing address (HIA section 1(1)(u) and HIA Reg., sections 3(a)(i) and 3(b)(i)). I find that the Complainant’s name and mailing address fall within the definition of “registration information” in section 1(1)(u) of HIA and sections 3(a)(i) and 3(b)(i) of the HIA Reg., and therefore, that this is “registration information” under HIA.

Diagnostic, treatment and care information

[para 42] I do not find it necessary to consider whether there is “diagnostic, treatment and care information” under HIA, as the complaint pertains only to information in the form of name and mailing address.

[para 43] “Health information” under section 1(1)(k) of HIA includes “registration information”. Due to my finding that there is “registration information”, I find that the information at issue in the Database is “health information”, as defined under section 1(1)(k) of HIA.

Custodian

[para 44] The parts of the HIA definitions relating to “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 45] The Complainant did not explicitly refer to the definition of a “custodian” under HIA. However, the Complainant said her only contact with Dr. L. was as a patient, when she received medical treatment at the Clinic. The Complainant says that she came to the Clinic before the Form was introduced in 2004, and even before HIA came into force. I accept the Complainant’s submission that the sole purpose of her visit to the Clinic and hence, for providing her health information to Dr. L. was to obtain medical treatment. I also accept her statement about the time frame of the Clinic visit.

[para 46] Dr. Lycka says that he is a custodian under HIA. Dr. L. says that he provides clinical services through the Professional Corporation, which operates a licensed non-hospital surgical facility and therapeutic lasers. Dr. L. provides a range of

medical services that include consultation, surgery, diagnostic services and biopsies. Dr. L. says his clinical practice of dermatology is organized, for business purposes, under the Professional Corporation.

[para 47] This Order takes the same approach as Order H2007-001 in regard to whether Dr. L. is a custodian. In my view, 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 “health service”, as defined in section 1(1)(m)(i) of HIA. Therefore, Dr. L. was a “custodian” under section 1(1)(f)(ix) of HIA, as he was a “health services provider” under section 1(1)(n) who was providing a “health service” under section 1(1)(f)(ix) of HIA.

[para 48] I accept Dr. L.’s submission that he is a custodian when he is providing a health service under HIA. Therefore, in regard to the individually identifying health information that was collected from the Complainant and subsequently entered into the Database, I find 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 49] The relevant rules governing collection of health information are set out in Part 3 (Collection of Health Information) of HIA. However, section 5 of HIA (Application of Parts of Act) addresses application to a collection before HIA came into force, as follows:

5(1) This Act, except Part 3, applies in respect of health information collected before or after the coming into force of this Act,

5(2) Part 3 of this Act applies only in respect of health information collected after the coming into force of this Act.

[para 50] The Complainant says that she attended at the Clinic to obtain medical treatment from Dr. L. before HIA came into force (i.e., HIA was proclaimed in force on April 25, 2001), which was also before the Form was introduced at the Clinic in 2004. The Complainant says that she has never returned to the Clinic. I said that I accept the Complainant’s statement as to this fact.

[para 51] Section 5(2) of HIA says that Part 3 of HIA only applies when health information is collected *after* the coming into force of HIA. The effect of section 5(2) is that HIA does not apply to the collection of health information that occurred before

April 25, 2001. I said that Dr. L. collected the Complainant's health information *before* HIA came into force. This means that in the circumstances of this case HIA does not apply to the collection, and therefore, I do not have jurisdiction at the Inquiry over Dr. L.'s collection of the Complainant's health information.

[para 52] Due to the finding that HIA does not apply to the collection of the Complainant's health information, it follows that I do not have authority to decide any issues that pertain to collection at the Inquiry. In particular, I do not have jurisdiction to decide Issue B and Issue C, which pertain to the application of section 18 and 20 of HIA.

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 53] 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 54] 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 55] I accept Dr. L.'s submission that Dr. L. used health information to provide health services (*which use is not at issue*), to compile the mailing list in the Database and to mail the information in the correspondence. 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.

Sections 25 and 27

[para 56] 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 57] The Complainant says Dr. L. used her health information for purposes of soliciting for fundraising without her consent and that Dr. L.'s use for 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 soliciting for fundraising.

[para 58] This Order takes the same approach to whether use is authorized under HIA as in Order H2007-001. 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.

[para 59] 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 60] In my view, consent does *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. Soliciting for fundraising is 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 soliciting for fundraising with *or* without consent.

[para 61] Furthermore, even if HIA authorized custodians to use individually identifying health information for purposes of soliciting for fundraising with consent (*which HIA does not*), there is no consent to use for this purpose in this case. The criteria for consent under HIA are prescribed in section 34(2) of HIA, which pertains only to disclosure. In my view, the criteria for consent in section 34(2) of HIA are not met.

[para 62] I said Dr. L. used health information for purposes that include entering the information into the Database and mailing the correspondence. 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. In my view, the Complainant discharged the initial burden of proof to show that Dr. L. used her health information.

[para 63] I do not accept Dr. L.'s submission that consent provides authority for use of health information under section 27 of HIA or 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 soliciting for fundraising. 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 the purposes of soliciting for fundraising under section 27 of HIA (use permitted in specified circumstances).

[para 64] 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 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 27 or section 25 of HIA.

[para 65] Given my finding under section 27 of HIA, I find that Dr. L.'s use of the Complainant's individually identifying health information, for purposes of 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 66] 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. However, custodians are prohibited from this use under section 25 and section 27 of HIA.

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 67] "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 68] 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 69] 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 when a custodian makes information available or releases information to another custodian or to a non-custodian.

[para 70] The relevant rules governing disclosure of health information in Part 5 (Disclosure of Health Information) of HIA, say:

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.

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 71] The Complainant says that Dr. L. disclosed her name and mailing address to the Foundation. The Complainant says that Dr. L.'s disclosure was evident when she received the correspondence that was mailed to her from the Foundation.

[para 72] 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. says that the Foundation is now a separate legal entity from the Clinic, the Professional Corporation and Corona, although all of these entities were once operated as one entity by Dr. L. personally. Dr. L. says that all of these entities are "related but separate" organizations that were initially "mixed with the Clinic".

[para 73] 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 Foundation form states that Dr. L. is "intimately involved" with the Foundation.

[para 74] The correspondence from the Professional Corporation refers to recipients as "patients", but requests donations for the Foundation and offers prizes from Corona. 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.

[para 75] I accept the evidence that the Database evolved along with these entities. The Database was formed in 2000, which was before the Foundation became a separate legal entity. The Database began as a mechanism to enable the Clinic to keep track of its patients. However, the Database grew and changed to include non-patients. The Clinic is no longer the only source of information for the Database that now has information about individuals from Corona and the Foundation.

[para 76] 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 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 77] In my view, when the Foundation became a separate legal entity the Foundation's continued access to the Database became a collection by the foundation and a disclosure by Dr. L. to the Foundation. The Foundation was registered as an Alberta Society on October 31, 2003. This was when Dr. L. made the information in the Database available to a non-custodian.

[para 78] The health information in the shared Database continued to be openly available and freely accessible by the Foundation. In my view when the Foundation became a separate legal entity, the Foundation's access to the Database became a disclosure by Dr. L. and a collection by the Foundation.

[para 79] Dr. L. says the correspondence was 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.

[para 80] The Complainant agreed with Dr. L. that it was not a disclosure to her to receive her own information in the mailing from the Foundation. However, the Complainant says her health information was disclosed to the Foundation beforehand in order for the Foundation to send her the letter. The Complainant says that the correspondence showed that there was a previous disclosure by Dr. L. and a collection and subsequent use by the Foundation.

[para 81] I agree with the parties that there was no disclosure to the Complainant in the mailing from the Foundation itself. However, I agree with the Complainant that there was a disclosure before the mailing, which was when the information was made available to the Foundation for the mailing to occur. Also, there is the possibility that the return address of a physician who specializes in treating certain medical conditions and the return address of a cancer foundation might reveal health information such as an individual's diagnosis.

[para 82] Disclosure means to make information available or to release information to another entity including to another custodian or a non-custodian. In my view, Dr. L. disclosed the Complainant's health information when the information in the shared Database became available to the Foundation as a separate legal entity. Disclosure to the Foundation occurred when the Foundation became a separate legal entity. When the Complainant received the correspondence with her own name and mailing address, she became aware of the disclosure to the Foundation.

Sections 31, 34, 35 and 36

[para 83] 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 84] The Complainant says that she did not provide any consent whatsoever for Dr. L. to disclose her health information. In contrast, Dr. L. argues that the Complainant consented to the disclosure of her health information in the Database for purposes of soliciting for fundraising. Dr. L. concedes there may be some individuals who were patients at the Clinic before the Form was introduced, and therefore, who may not have consented to the disclosure on the Form.

[para 85] 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 the Foundation, if there was consent.

[para 86] 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 87] 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. 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. Therefore, in this case there is no authority to disclose the health information pursuant to consent under section 34(2) of HIA.

[para 88] 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 the Foundation in the circumstances of this case, because this is a shared database. The information in the shared database is freely available to the Foundation.

[para 89] 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 the Foundation, which shows that the health information was previously collected and used by that external entity. 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 before it could send her the mail. I accept the Complainant's submission that Dr. L. did not have authority to disclose her health information to the Foundation, pursuant to consent.

[para 90] 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 Complainant's individually identifying health information under section 34 of HIA (disclosure permitted with consent).

Section 35

[para 91] I do not find it necessary to consider the application of section 35 of HIA, because the information at issue is name and mailing address, which is not "diagnostic, treatment and care information." I do not have the authority to consider the application of HIA to information for which a complaint was never made. Consistent with my approach earlier in this Order to the definition of "diagnostic, treatment and care information," I do not find it necessary to consider the application of section 35 of HIA because there is no "diagnostic, treatment and care information" to consider.

Section 36

[para 92] Dr. L. says that section 36 of HIA is not relevant to the circumstances of this case because "section 36 deals with disclosure without consent". Dr. L. says that first, there was no disclosure of any registration information, and second even if there was disclosure, there was consent for any "registration information" that was disclosed. I agree with Dr. L. insofar as he says that the health information in the Database includes "registration information", as defined in section 1(1)(u) of HIA.

[para 93] 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 94] 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 the Foundation under either section 34 with consent or under section 36 of HIA (disclosure permitted without consent in specified circumstances).

[para 95] 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. All of the above considerations point towards a finding that Dr. L. did not have authority to disclose the health information under HIA.

[para 96] Given my findings under sections 34 and 36 of HIA, I find that Dr. L.'s disclosure of health information for purposes of 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

[para 97] In summary, this Order finds that:

- HIA does not apply to the Custodian's collection of the Complainant's health information for purposes of soliciting for fundraising, as the health information was collected before HIA came into force;
- There is no authority under HIA for a custodian to use an individual's health information for the purpose of 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 soliciting for fundraising; and
- There is authority under HIA for a custodian to disclose an individual's health information for the purpose of 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 soliciting for fundraising. Use by that person, for purposes of soliciting for fundraising without consent, is an offence under section 107(2)(f) of HIA.

Comment

[para 98] 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. However, 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 99] 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 100] I intend to order Dr. L. to comply with the duty under HIA to prepare a privacy impact assessment and to stop using and disclosing health information for purposes of soliciting for fundraising under HIA.

VII. ORDER

[para 101] I make the following Order under section 80 of HIA:

- I find that:
 - ISSUE A: The “Custodian” “used” and “disclosed “individually identifying” “health information” of the Complainant as these terms are defined in HIA;
 - ISSUE B: HIA does not apply to the Custodian’s collection of health information for purposes of soliciting for fundraising under section 20 of HIA (collection permitted in specified circumstances), or to the Custodian’s authority to collect the health information under section 20(b) of HIA;
 - ISSUE C: HIA does not apply to the Custodian’s collection of health information for purposes of soliciting for fundraising in accordance with 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 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 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 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: There is no information to consider under section 35 of HIA (disclosure permitted without consent in specified circumstances), as the complaint did not pertain to “diagnostic, treatment and care information” under HIA;
 - ISSUE H: The Custodian did not have authority to disclose any of the Complainant’s “registration information” for purposes of 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 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
- ISSUE 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 102] Pursuant to section 80 of HIA, I order the Custodian to:

- Submit a privacy impact assessment ("PIA") for the health information in the Database, within 50 days of receiving a copy of this Order. This PIA can be submitted concurrently with the PIA in Order H2007-001;
- Stop using and disclosing the health information in the Database for purposes of 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