

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-006

January 31, 2008

ENDERMOLOGIE CENTRE CORPORATION

Case File Number P0493

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

Summary: In early 2006, the patient ("Complainant") went back to see her doctor, Dr. Barry Lycka ("Dr. L."), for treatment of skin cancer at Dr. L.'s physician office clinic ("Clinic"). At the Clinic, the Complainant completed a new Patient History Form ("Form"), where she opted out of the mailing list ("Database").

Nevertheless from March to June of 2006, the Complainant received "solicitations" from the Barry Lycka Professional Corporation ("Professional Corporation"), the Canadian Skin Cancer Foundation ("Foundation") and the Corona Rejuvenation Centre & Spa ("Corona"). Corona is the trade name for the Endermologie Centre Corporation ("Endermologie" or "Organization"). Dr. L. shares the Database with Corona and the Foundation.

The Complainant alleged that Endermologie, through Corona, contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA") by collecting and using her personal information for purposes of marketing. The Inquiry was held in conjunction with two other inquiries for Case File Numbers H1284 and P0494, which resulted in Order H2007-001 and Order P2007-007, with the same Complainant and Dr. L. and the Foundation, respectively under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") and PIPA.

The Foundation is involved in three other inquiries for Case File Numbers P0481, P0490 and P0489, which resulted in Orders P2007-008, P2007-009 and P2007-012. Dr. L. is involved in two other inquiries for Case File Numbers H1325 and H1331, which resulted in Order H2007-003 and Order H2007-004. 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:

ISSUE A: Neither party has the burden of proof for the definitional issues (personal information, organization, collect and use);

ISSUE B: The Organization has the burden of proving that any collection or use was in accordance with section 7(1) of PIPA. In particular:

- The Organization has the burden of proving that any collection or use without consent was permitted by section 14 or section 17 of PIPA; and
- Alternatively, if the Organization does not have the authority to collect or use without consent, the Organization has the burden of proving that any collection or use was permitted with consent in accordance with section 8 of PIPA;

ISSUE C: The Organization has the burden of proving that notification was not required, or alternatively, that it provided notification in accordance with section 13 of PIPA;

ISSUE D: The Organization has the burden of proving that any collection or use was reasonable under section 11(1) and section 16(1) of PIPA;

ISSUE E: The Organization has the burden of proving that any collection or use was reasonable under section 11(2) and section 16(2) of PIPA;

ISSUE F: The Organization has the burden of proving that the personal information was collected directly, or alternatively, that it collected the personal information indirectly in accordance with section 12 of PIPA;

ISSUE G: The “Organization” “collected” and “used” the “personal information”, within the meaning of these terms under PIPA;

ISSUE H: The Organization did not collect and use the personal information in accordance with section 7(1) of PIPA (no collection or use without either authorization or consent). In particular:

- The Organization did not have the authority to collect and use the personal information without consent, as permitted by section 14 and section 17 of PIPA (authorization for collection and use without consent); and
- The Organization did not have the authority to collect and use the personal information with consent to collect and use the personal information in accordance with section 8 of PIPA (collection or use with consent);

ISSUE I: The Organization did not collect the personal information in accordance with section 13 of PIPA (notification required for collection);

ISSUE J: The Organization did not collect and use the personal information in accordance with section 11(1) and section 16(1) of PIPA (collection and use for purposes that are reasonable);

ISSUE K: The Organization did not collect and use the personal information in accordance with section 11(2) and section 16(2) of PIPA (collection and use to the extent reasonable for meeting the purposes);

ISSUE L: The Organization did not collect the personal information directly from the Complainant (direct collection); and

ISSUE M: The Organization collected the personal information indirectly and did not collect the information in accordance with section 12 (indirect collection without consent).

Orders Cited: AB HIA: H2007-004, H2007-003, H2007-001; AB PIPA: P2007-012, P2007-011, P2007-009, P2007-008 and P2007-007.

Statutes Cited: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(d) and 1(1)(w); *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 1(i), 1(i)(i), 1(k), 2, 3, 7(1), 7(1)(a), 7(1)(b), 7(1)(c), 8, 8(1), 8(2), 11, 11(1), 11(2), 12, 13, 13(1), 13(2), 13(3), 13(4), 14, 16, 16(1), 16(2), 17, 20, 52 and 52(3)(e).

I. BACKGROUND

[para 1] In early 2006, the patient (“Complainant”) went back to see her doctor, Dr. Barry Lycka (“Dr. L.”), for treatment of skin cancer at Dr. L.’s physician office clinic (“Clinic”). At the Clinic, the Complainant completed a new Patient History Form (“Form”), where she opted out of the mailing list (“Database”).

[para 2] Nevertheless from March to June of 2006, the Complainant received “solicitations” from the Barry Lycka Professional Corporation (“Professional Corporation”), the Canadian Skin Cancer Foundation (“Foundation”) and the Corona Rejuvenation Centre & Spa (“Corona”).

[para 3] Dr. L. shares the Database with Corona and the Foundation. Corona is the trade name for the Endermologie Centre Corporation (“Endermologie” or “Organization”). The Complainant alleged that Endermologie, through Corona, contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“PIPA”) by collecting and using her personal information for purposes of marketing.

[para 4] The matter was set down for a written inquiry (“Inquiry”). The Information and Privacy Commissioner, Frank Work, Q. C. (“Commissioner”) delegated me to hear the Inquiry. At the Inquiry, the parties provided written initial submissions and written rebuttal submissions, which were exchanged between the parties. The parties provided the same written initial and written rebuttal submissions for all three of the concurrent inquiries.

[para 5] The Complainant requested anonymity, so her name was removed before submissions were exchanged. The Complainant requested that information she previously provided to the Office for purposes of making her complaint, be considered as part of her written initial submission at the Inquiry.

[para 6] The Inquiry was held in conjunction with two other inquiries for Case File Numbers H1284 and P0494, which resulted in Order H2007-001 and Order P2007-007 with the same Complainant and Dr. L. and the Foundation, respectively under the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”) and under PIPA.

[para 7] The Foundation is involved in three other inquiries for Case File Numbers P0481, P0490 and P0489, which resulted in Orders P2007-008, P2007-009 and P2007-012. Dr. L. is involved in two other inquiries for Case File Numbers H1325 and H1331, which resulted in Order H2007-003 and Order H2007-004.

[para 8] The Professional Corporation is involved in an inquiry for Case File Number P0482, which resulted in Order P2007-011. The respondents provided the same initial written submission for seven of the inquiries. There are a total of nine inquiries pertaining to the Database.

II. RECORDS/INFORMATION

[para 9] As this is a complaint, there are no records at issue in the usual sense. The Inquiry pertains to the authority of Endermologie, through Corona, to collect and use personal information for purposes of marketing. Endermologie says the information in the Database consists of name, telephone number, mailing address, gender and services requested.

III. INQUIRY ISSUES

[para 10] The issues in the Notice of Inquiry are:

ISSUE A: Should neither party have the burden of proof for the definitional issues (personal information, organization, collect, use and disclose)?

ISSUE B: Should the Organization have the burden of proving that any collection, use or disclosure was in accordance with section 7(1) of PIPA? In particular:

- Should the Organization have the burden of proving that any collection, use or disclosure without consent was permitted by section 14, section 17 or section 20 of PIPA?
- Alternatively, if the Organization did not have the authority to collect, use or disclose without consent, should the Organization have the burden of proving that any collection, use or disclosure was permitted with consent in accordance with section 8 of PIPA?

ISSUE C: Should the Organization have the burden of proving that notification was not required, or alternatively, that it provided notification in accordance with section 13 of PIPA?

ISSUE D: Should the Organization have the burden of proving that any collection, use or disclosure was reasonable under section 11(1), section 16(1) and section 19(1) of PIPA?

ISSUE E: Should the Organization have the burden of proving that any collection, use or disclosure was reasonable under section 11(2), section 16(2) and section 19(2) of PIPA?

ISSUE F: Should the Organization have the burden of proving that the personal information was collected directly, or alternatively, that it collected the personal information indirectly in accordance with section 12 of PIPA?

ISSUE G: Did the "Organization" "collect", "use" or "disclose" "personal information", as these terms are defined in PIPA?

[para 11] If I find that the answer to the above question is "yes", I will decide the following issues:

ISSUE H: Did the Organization collect, use or disclose the personal information in accordance with section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular:

- Did the Organization have the authority to collect, use or disclose the personal information without consent, as permitted by section 14, section 17 or section 20 of PIPA (authorization for collection, use or disclosure without consent)?
- Alternatively, if the Organization did not have the authority to collect, use or disclose the personal information without consent, did the Organization obtain consent to collect, use or disclose the personal information in accordance with section 8 of PIPA (collection, use or disclosure with consent)?

ISSUE I: Did the Organization collect the personal information in accordance with section 13 of PIPA? In particular, was the Organization required to provide, and if so did it provide, notification in accordance with section 13 of PIPA (notification required for collection)?

ISSUE J: Did the Organization collect, use or disclose the personal information in accordance with section 11(1), section 16(1) and section 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

ISSUE K: Did the Organization collect, use or disclose the personal information in accordance with section 11(2), section 16(2) and section 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

ISSUE L: Did the Organization collect the personal information directly from the Complainant (direct collection)?

ISSUE M: If the Organization did not collect the personal information directly from the Complainant, was the collection in accordance with section 12 (indirect collection without consent)?

[para 12] The Inquiry pertains only to collection and use of personal information for purposes of marketing. The corollary is that collection and use of personal information for other purposes, such as for the provision of health services, is *not* at issue. Disclosure is also *not* at issue. References to Corona, as the trade name, are to be read generally as references to Endermologie, which is the legal entity.

IV. SUMMARY OF FACTS, EVIDENCE AND ARGUMENT

[para 13] The parties provided the same written initial and written rebuttal submissions for the three concurrent inquiries. The more complete version of the general background facts, evidence and argument pertaining to the Database that was provided by the respondents, including Endermologie, is set out in Order H2007-001.

[para 14] This Order provides the more complete version of the respondent's argument pertaining to the application of PIPA. The more complete version of the Complainant's facts, evidence and argument is provided in Order H2007-001. The information that is set out in full in another Order will not be repeated in this Order.

The Facts

[para 15] In her written submissions, the Complainant alleged that Endermologie, through Corona, contravened PIPA by collecting and using her personal information for purposes of marketing. The Complainant says that in early 2006 she returned to see Dr. L. at the Clinic for a review of her skin cancer progression. She says that she completed the new Patient History Form ("Form") during that physician visit, as the Form had been updated since her last visit to the Clinic.

[para 16] The Complainant says that she opted out of the mailing list on the Form, and additionally, she verbally told the Clinic reception staff that she did *not* want to be on the mailing list. The Complainant says that within a month after her visit to the Clinic, she began to receive mailings from Dr. L.'s office through the Professional Corporation, and over time she received mailings from the Foundation and Corona.

[para 17] The Complainant says that she telephoned the Clinic about the mailings and reminded the staff about her "opt-out" on the Form. The Complainant says that Clinic staff assured her they would update her file and that she would not receive further mailings. Nevertheless, the Complainant continued to receive further mailings, including from Corona. The Complainant then made a complaint to the Commissioner's Office, saying that Corona collected and used her personal information for purposes of marketing in contravention of PIPA.

[para 18] Endermologie's written submissions describe the development of the Database and the evolution of the relationships among Dr. L., the Clinic, the Barry Lycka Professional Corporation ("Professional Corporation"), the Foundation, Corona and Endermologie. Endermologie says that the Database was established in 2000, but major changes were subsequently made.

[para 19] In 2004, the new Patient History Form ("Form") was developed, which patients completed when they returned to the Clinic. Endermologie says the Database was updated with what Endermologie describes as "consent" on the Form, for the personal information of patients to be entered into the Database. The Form was initiated about 18 months before the complaints arose that gave rise to the Inquiry.

[para 20] Endermologie says that the primary purpose of the Database is "keeping track of all the patients seen in the Clinic" and the secondary purpose of the Database is to "facilitate information distribution". Endermologie says that initially the Database only included Clinic patients, but the Database expanded to include non-patients such as Corona clients, Corona seminar attendees and Foundation donors. Corona shares the Database with Dr. L. and the Foundation.

The Evidence

[para 21] When she made her complaint to the Office, the Complainant provided the following three packages:

- *First package (Professional Corporation)* - This four-page package from the Professional Corporation to the Complainant, consists of a covering letter dated March 2006 and a three-page attachment that begins, "Dear Friend". The letter begins, "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 bottom of the covering letter contains the signature and typewritten name of the Controller of the Barry Lycka Professional Corporation.
- *Second package (Corona)* - This seven-page package from Corona consists of a covering letter, a newsletter, a form and a flyer for services that include a medi-spa. The covering letter was addressed to the Complainant by first name and middle initial. The Complainant's first name and middle initial is repeated within the body of the letter. The bottom of the covering letter contains the signature and typewritten name of an individual at the Corona Rejuvenation Centre and Spa.
- *Third package* - This five-page package consists of a four-page brochure with a registration form that the Complainant received from a third party. The brochure is for a "MSI (Multiple Streams of Income) 2006 Chicago" conference on June 2-4, 2006, which is a "seminar for your financial well being" where "Dr. Barry Lycka will teach you about how to make money from absentee businesses like medi-spas."

[para 22] The initial written submission of the respondents contains ten tabs and a "Table of Authorities". The first eight tabs pertain to evidence, as follows:

- *Tab 1: Alberta Corporation Registration Information (Endermologie & Corona) – The Endermologie Centre Corporation 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 described as 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 (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 for patients 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 the patient’s signature. The balance of the Form consists of 40 questions, which are preceded by this statement:

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

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

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

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

- *Tab 6: Corona Consultation Booking Form (Corona)* - This one-page “Consultation Booking Form” refers to an information seminar and has spaces for name, address, home phone, alternate phone and email address. Individuals are invited 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 (Clinic)* - These two pages are chart procedures for Clinic staff when implementing the choice of “Yes” or “No” made by patients in response to Question #40 on the Form, which is the opt out provision. 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 (Professional Corporation)* - This four-page package contains a letter dated April 2006 that begins, “Dear Friend”, which is almost identical to the March 2006 letter provided by the Complainant. The second paragraph reads, “I am writing to you because of your association in one way or another with Dr. Lycka. All of the many patients, colleagues, family members and friends are very aware of the health and cosmetic problems that Dr. Lycka has helped so many people with for over twenty years in Edmonton.” The letter contains the signature and typewritten name and title of the Controller of the Professional Corporation.

 - *Second letter (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 contains the typewritten name of the same individual as in the above letter.

 - *Third letter (Foundation)* - This June 2006 single page letter is addressed to the recipient by first name and mailing address. The letter refers to the above undated letter for Dr. Lycka’s 50th birthday party on June 26 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 Dr. Barry Lycka, FRCP, Canadian Cancer Skin Foundation.

The Arguments

[para 23] The Complainant says that Endermologie contravened PIPA when collecting and using her personal information for purposes of marketing. The Complainant takes the position that she opted out of the mailing list on the Form at the Clinic and did not consent to her personal information being collected or used for purposes other than the provision of health services. The Complainant says that she has not had any contact with the Foundation, Endermologie or Corona.

[para 24] However, Endermologie takes the position that it did not contravene PIPA. Endermologie says that any Clinic patients with information in the Database have consented to collection and use of their personal information for purposes of marketing, and therefore, any collection or use for marketing is authorized under PIPA.

[para 25] Endermologie's argument in regard to PIPA is as follows:

Personal Information Privacy [sic] Act

55. The Respondents concede "personal information" as defined under PIPA was collected and used. It was not disclosed to anyone else.

56. Pursuant to s. 7 of PIPA, the Respondents received consent of the individuals to use the information, as set out above. The consent forms clearly state the individuals are consenting to getting further information (Foundation and Corona consent) or their names will be placed on a mailing list (Clinic). This is what the consent allowed, and this is what was received by the recipients on the mailing list.

57. Sections 14, 17 and 20 are not relevant to this inquiry because consent was obtained, or all reasonable steps were taken, and it was believed consent was obtained.

58. Notwithstanding the attempts made to ensure consent was obtained, the first letter sent April 10, 2006 would provide notice to the Complainants that the Respondents were using their information to invite them to a party/fundraiser. The Respondent acted upon all requests received to remove names from the database. This would fulfill the requirement of s. 8(3) of PIPA. It has no record of receiving a request or complaint that would match the limited information provided for this inquiry.

59. With respect to s. 13, we believe by the nature of the consent, the Respondents have fulfilled this requirement under s. 8(2) and therefore s. 13(4) is the relevant section. The individuals, by consenting to being on the mailing list, or receiving further information are deemed to have consented to have their addresses used for the purpose of sending the information.

60. The individuals were told, by virtue of the consent they gave, that the information was being collected for use to add their names to a mailing list, or to send further information. The letters in question were a reasonable use, and were therefore in compliance with ss. 11, 16 and 19 of the PIPA.

61. The information was collected directly from the users of the Respondents services. Without knowing more about the Complainant, the Respondents believe they would

have provided the information, but it is impossible to check with the limited information they have.

Summary

76. The Respondents submit there was no breach of PIPA or HIA for the following reasons:

- (a) The information was collected properly pursuant to both HIA and PIPA;
- (b) There were procedures in place to ensure consents were obtained and individuals in the database who did not want to be included could be and would be removed;
- (c) The use of mailing address is not an invasion of privacy; and
- (d) The few number of complaints (3) relative to the large number of letters sent (59,000) would met [sic] the test of reasonableness that the system was functioning appropriately.

[para 26] A chronology of the events described by the parties is as follows:

- 1984 (approximate) - Dr. L. started in medical practice;
- August 31, 1989 - Professional Corporation registered at corporate registry;
- 2000 - Clinic established mailing list or Database;
- October 31, 2003 - Foundation registered at corporate registry;
- January 1, 2004 - PIPA proclaimed into force;
- 2004 - Clinic introduced new Patient History Form;
- November 24, 2004 - Endermologie registered at corporate registry;
- March 7, 2005 - Corona registered at corporate registry;
- 2006 - Complainant completed the Patient History Form at the Clinic; and
- March - June, 2006 - Mailings received from the Professional Corporation and Corona.

V. DISCUSSION OF PRELIMINARY ISSUES

Anonymity

[para 27] The usual procedure at an inquiry is that the parties disclose their identities to each other. However, there are exceptions to the general rule. An exception arises when one of the parties has a compelling reason why his or her name should not be disclosed during the process of an inquiry.

[para 28] The Complainant requested anonymity in these proceedings on the basis that she is currently Dr. L.'s patient. In her initial written submission, she says:

I cannot take forward my concern to Dr. Lycka in person as I feel at a disadvantage on several fronts. First, he may again operate on me to remove cancerous tissue and I do not feel I am able to enter into a disagreeable 'meeting of the minds' about this issue.

Consider my position – would you want to go under the knife of someone you had a disagreement with?! My health is literally, in his hands.

[para 29] Endermologie’s written rebuttal submission says:

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

[para 30] I accept the argument that it is the Complainant’s perception that disclosing her identity to Dr. L. in these proceedings could “disadvantage” her in terms of obtaining health services. I accept the Complainant’s concern that disclosing her identity in these proceedings could negatively affect her ongoing relationship with Dr. L. and access to medical treatment.

[para 31] This Order takes the same approach to this issue as Orders H2007-003, H2007-004, P2007-008 and P2007-009, as well as Orders H2007-001 and P2007-007, which pertain to the same Complainant. These Orders all pertain to Clinic patients of Dr. L. who requested anonymity during the inquiry proceedings. In the Complainant’s own words, “My health is literally, in his hands.” In my view, the Complainant has provided a compelling reason for anonymity in these proceedings.

Non-inquiry issue

[para 32] The second letter under Tab 8 in Endermologie’s initial submission is the letter that begins, “[D]isappointed and saddened am I”. The letter says, “A few weeks ago we sent you an invitation to what will be the social event of 2006. We didn’t hear from you so we wrote you again. Still no response. So I’m writing again to make sure you still have a heart beat.”

[para 33] Endermologie raises the following issue:

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

[para 34] The Complainant responds, as follows:

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

[para 35] I accept the argument of the parties that whether letters were “insulting and in poor taste” is not relevant to the Inquiry. This Order takes the same approach as Orders H2007-003, H2007-004, P2007-008, P2007-009, P2007-011 and P2007-012, as well as Orders H2007-001 and P2007-007, with the same Complainant. I said that whether the letters were “insulting and in poor taste” or “rude and disrespectful” was not

relevant to the Inquiry. Additionally, these letters were sent from the Professional Corporation and the Foundation, not from Corona or Endermologie.

[para 36] My jurisdiction at the Inquiry and the scope of this Order are restricted to the collection, use and disclosure issues before the Inquiry, as those issues pertain to Endermologie under PIPA. For example, section 52 of PIPA allows me to issue an Order that requires organizations to stop collecting and using personal information in contravention of PIPA (section 52(3)(e)).

Scope of complaint

[para 37] The complaint made by the Complainant that pertains to Endermologie, through Corona, pertains to the collection and use of the Complainant's personal contact information for purposes of marketing. The complaint does *not* pertain to disclosure by Corona. I do not have jurisdiction at the Inquiry to decide matters that are beyond the scope of the complaint, so this Order does not address the Inquiry issues that pertain to disclosure of personal information.

VI. DISCUSSION OF INQUIRY ISSUES

[para 38] This Order will first address the matters pertaining to burden of proof that are set out in Issues A through F, then the definitional matters in Issue G and then the substantive matters in Issues H through M.

ISSUE A: SHOULD NEITHER PARTY HAVE THE BURDEN OF PROOF FOR THE DEFINITIONAL ISSUES (PERSONAL INFORMATION, ORGANIZATION, COLLECT, USE AND DISCLOSE)?

ISSUE B: SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT ANY COLLECTION, USE OR DISCLOSURE WAS IN ACCORDANCE WITH SECTION 7(1) OF PIPA? IN PARTICULAR:

- **SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT ANY COLLECTION, USE OR DISCLOSURE WITHOUT CONSENT WAS PERMITTED BY SECTION 14, SECTION 17 OR SECTION 20 OF PIPA?**
- **ALTERNATIVELY, IF THE ORGANIZATION DID NOT HAVE THE AUTHORITY TO COLLECT, USE OR DISCLOSE WITHOUT CONSENT, SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT ANY COLLECTION, USE OR DISCLOSURE WAS PERMITTED WITH CONSENT IN ACCORDANCE WITH SECTION 8 OF PIPA?**

ISSUE C: SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT NOTIFICATION WAS NOT REQUIRED, OR ALTERNATIVELY, THAT IT PROVIDED NOTIFICATION IN ACCORDANCE WITH SECTION 13 OF PIPA?

ISSUE D: SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT ANY COLLECTION, USE OR DISCLOSURE WAS REASONABLE UNDER SECTION 11(1), SECTION 16(1) AND SECTION 19(1) OF PIPA?

ISSUE E: SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT ANY COLLECTION, USE OR DISCLOSURE WAS REASONABLE UNDER SECTION 11(2), SECTION 16(2) AND SECTION 19(2) OF PIPA?

ISSUE F: SHOULD THE ORGANIZATION HAVE THE BURDEN OF PROVING THAT THE PERSONAL INFORMATION WAS COLLECTED DIRECTLY, OR ALTERNATIVELY, THAT IT COLLECTED THE PERSONAL INFORMATION INDIRECTLY IN ACCORDANCE WITH SECTION 12 OF PIPA?

[para 39] This Order takes the same approach to burden of proof as Orders H2007-001, H2007-004 and P2007-007. The test adopted for allocation of burden of proof when PIPA is silent, is that the party who is in the best position to address the matters at issue has the burden of proof. Issue G 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 set out in Issue G.

[para 40] 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 personal information was collected and used. If the Complainant discharges this initial burden, then the burden shifts to Endermologie, as it is in the better position to address the substantive matters about whether any collection and use is in accordance with PIPA.

[para 41] Therefore, I find that the Complainant has the initial burden and Endermologie has the further burden of proof under Issues H through M, to show that any collection and use was in accordance with sections 7(1), 8, 11(1), 11(2), 12, 13, 14, 16(1), 16(2) and 17 of PIPA.

ISSUE G: DID THE “ORGANIZATION” “COLLECT”, “USE” OR “DISCLOSE” “PERSONAL INFORMATION”, AS THESE TERMS ARE DEFINED IN PIPA?

[para 42] Issue G includes five sub issues that are whether there is an “organization”, a “collection”, a “use”, a “disclosure” and “personal information”. I will begin by considering whether there is “personal information” and then consider whether there is an “organization”. I will then address whether there is a “collection” and a “use”. As the complaint in regard to Corona did not pertain to “disclosure”, this term will not be addressed. If I find the answer to the balance of the above question in Issue G is “yes”, I go on to decide the substantive matters in Issues H through M.

Personal Information

[para 43] Section 1 (Definitions) of PIPA says:

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

[para 44] The information that the Complainant complained about was “contact information” that consists of name, telephone number and mailing address. I accept the submission of Endermologie that the Database contains the names, telephone numbers and mailing addresses of individuals, and therefore, contains “personal information”, as defined in section 1(k) of PIPA. The parties do not dispute that the information at issue is “personal information”.

[para 45] In order for information to be “personal information” under section 1(k) of PIPA, the information must be about an identifiable individual. In my view, the Complainant’s name, telephone number and mailing address is information about an identifiable individual. Therefore, I find that the Complainant’s name, telephone number and mailing address in the Database is “personal information,” as defined in section 1(k) of PIPA.

Organization

[para 46] PIPA says:

1(i) “organization” includes

(i) a corporation,

but does not include an individual acting in a personal or domestic capacity.

[para 47] The Complainant did not explicitly address whether Endermologie or Corona are an “organization” under PIPA. The Complainant said her only contact was with Dr. L. at the Clinic, as Dr. L. is her treating physician for skin cancer. The Complainant says that she had no contact whatsoever with Endermologie or Corona.

[para 48] Similarly, Endermologie did not specifically address whether either or both of Endermologie and Corona are an “organization” under PIPA. Endermologie says that it collected and used “personal information” in the Database in accordance with PIPA. Endermologie provided a corporate registry search under Tab 1 that shows the Endermologie Center Corporation became a “Named Alberta Corporation” on November 24, 2004.

[para 49] Also under Tab 1, Endermologie provided a corporate registry search showing that on March 7, 2005, the Corona Rejuvenation Centre & Spa became the registered trade name for Endermologie Centre Corporation. The corporate registry search says that the commencement date for Corona is February 1, 2005 and that Corona is a medical spa business.

[para 50] Therefore, I find that Endermologie is a “corporation” as defined in section 1(i)(i), and therefore, an “organization” under section 1(i) of PIPA. I find that Corona is registered at corporate registry as the trade name for Endermologie.

Collection

[para 51] PIPA does not define “collect”. However, in Orders H2007-001 and P2007-011, which also pertain to the Database, I adopted the definition for “collect” that is set out in the *Health Information Act*, R.S.A. 2000, c. H-5 (“HIA”), which is as follows:

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

[para 52] In regard to whether there was a collection, the Complainant says that Corona collected her name and mailing address from the shared Database, as she had no direct contact whatsoever with Corona. Endermologie says that Corona, the Foundation and the Clinic all had access to the shared Database. Endermologie does not dispute that Corona collected contact information that included the name and mailing address of Clinic patients from the Database.

[para 53] Excerpts from Endermologie’s submission say:

The Foundation was first registered as an active non-profit society in 2003, but fund raising efforts had been initiated prior to that time. These efforts were coordinated by Dr. Lycka personally.

Dr. Lycka’s Professional Corporation and the Foundation are related but separate organizations. Many of the patients at the Clinic are also involved with the Foundation, but each entity has their own method of obtaining consent from the patients/clients to include their names on the mailing list.

In 2000 because of the large numbers of patients who had been seen in the Clinic over the years, and because of the repeated requests for information and seminars, the Clinic established a database with the names, phone numbers and addresses of all the patients who had recently attended the Clinic.

The database was established with a primary purpose of keeping track of all the patients seen in the Clinic. A secondary purpose was to facilitate information distribution by enabling more efficient and timely mail-out information to former patients, and other members of the public who have expressed an interest in the services, including the informational and fundraising services provided by Dr. Lycka.

In addition to the patients seen in the Clinic, clients who attend any of its seminars are asked if they wish to be included in the data base. Likewise, people who donate to the Foundation are given the same choice.

[para 54] I accept Endermologie’s submission that the Database consists of personal information that was collected from individuals including Dr. L.’s patients at the Clinic. It is not in dispute that Dr. L., through the Professional Corporation at the Clinic,

collected the Complainant's personal information and used that information to enter the information into the Database. The Complainant says that she received the mailing from Corona after she completed the new Form at the Clinic.

[para 55] It is not in dispute that Corona collected the Complainant's name and address from the Database. In my view, Endermologie, through Corona, gathered, acquired, received or obtained the Complainant's personal information, and thereby, "collected" personal information under PIPA. Therefore, I find that Endermologie, through Corona, collected the Complainant's personal information from the Database.

Use

[para 56] PIPA does not define "use". However, in Orders H2007-001, H2007-004 and P2007-011, which also pertain to the Database, I adopted the following definition for "use" that is set out under HIA:

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 57] I accept Endermologie's submission that, through its trade name of Corona, it used the personal information in the Database to send mailings to the Complainant for purposes of marketing. In my view, Endermologie, through its trade name of Corona, applied the Complainant's personal information for a purpose, and therefore, I find that Endermologie "used" the personal information under PIPA.

[para 58] In summary, under Issue G, I have determined that the "Organization" did "collect" and "use" the Complainant's "personal information", within the meaning of these terms in PIPA. As my answer to the balance of the question in Issue G is "yes", I will now decide the substantive matters in Issues H through M.

[para 59] My findings under Issue G mean that the Complainant has discharged her initial burden of proof to show that Endermologie collected and used her personal information. This means that the burden of proof now shifts to Endermologie to show that the collection and use was in accordance with PIPA.

ISSUE H: DID THE ORGANIZATION COLLECT, USE OR DISCLOSE THE PERSONAL INFORMATION IN ACCORDANCE WITH SECTION 7(1) OF PIPA (NO COLLECTION, USE OR DISCLOSURE WITHOUT EITHER AUTHORIZATION OR CONSENT)? IN PARTICULAR:

- **DID THE ORGANIZATION HAVE THE AUTHORITY TO COLLECT, USE OR DISCLOSE THE PERSONAL INFORMATION WITHOUT CONSENT, AS PERMITTED BY SECTION 14, SECTION 17 OR SECTION 20 OF PIPA (AUTHORIZATION FOR COLLECTION, USE OR DISCLOSURE WITHOUT CONSENT)?**

- **ALTERNATIVELY, IF THE ORGANIZATION DID NOT HAVE THE AUTHORITY TO COLLECT, USE OR DISCLOSE THE PERSONAL INFORMATION WITHOUT CONSENT, DID THE ORGANIZATION OBTAIN CONSENT TO COLLECT, USE OR DISCLOSE THE PERSONAL INFORMATION IN ACCORDANCE WITH SECTION 8 OF PIPA (COLLECTION, USE OR DISCLOSURE WITH CONSENT)?**

[para 60] The relevant parts of PIPA say:

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

- (a) collect that information unless the individual consents to the collection of that information,
- (b) collect that information from a source other than the individual unless the individual consents to the collection of that information from the other source,
- (c) use that information unless the individual consents to the use of that information.

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

8(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

- (a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and
- (b) it is reasonable that a person would voluntarily provide that information.

8(4) Subsections (2) and (3) are not to be construed so as to authorize an organization to collect, use or disclose personal information for any purpose other than the particular purposes for which the information was collected.

14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:

- (b) the collection of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the collection.

17 An organization may use personal information about an individual without the consent of that individual but only if one or more of the following are applicable:

- (b) the use of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the use.

[para 61] The Complainant says that Endermologie, through its trade name of Corona, collected and used her personal information for purposes of marketing, without

her consent and in contravention of PIPA. In contrast, Endermologie says that any collection or use of the Complainant's personal information was authorized under PIPA pursuant to consent.

[para 62] Endermologie says that there was actual consent under section 8(1) of PIPA for Corona to collect and use the personal information in the Database for the mailing list, the mailings and the marketing. Endermologie says there is also deemed consent under section 8(2) of PIPA for Corona to collect and use the names and mailing addresses in the Database for the purpose of sending the mailings.

[para 63] Section 7(1) says that *except* where PIPA provides otherwise, an organization shall not collect, indirectly collect or use personal information *unless* the individual consents to that collection, indirect collection or use (sections 7(1)(a), 7(1)(b) and 7(1)(c)). Therefore, I will first consider whether Corona had authority to collect or use the personal information without consent, pursuant to sections 14 and 17 of PIPA. If I find that there is no such authority for the collection and use, I will consider whether there was consent under section 8 of PIPA.

Without consent

[para 64] Sections 14 and 17 of PIPA authorize an organization to collect and use personal information about an individual without consent in specific circumstances. Endermologie says that sections 14 and 17 of PIPA are not relevant in the circumstances of this case, because there was consent. Endermologie did not provide any argument in the alternative or provide any evidence to show that any of the exceptions to consent under sections 14 or 17 of PIPA apply to authorize collection or use without consent.

[para 65] I accept Endermologie's submission that none of the provisions that are exceptions to consent under sections 14 and 17 apply. For this reason, I find that Endermologie is not authorized to collect or use the Complainant's personal information without consent for purposes of marketing under section 14 or section 17 of PIPA.

With consent

[para 66] Section 8(1) of PIPA says that an individual may give consent in writing or orally to the collection or use of personal information about the individual. Section 8(2) of PIPA says that an individual may be deemed to consent to collection or use for a particular purpose, without actually giving consent, if the individual voluntarily provides the information to the organization for that purpose *and* it is reasonable that a person would voluntarily provide that information.

Actual consent

[para 67] Endermologie says that Clinic patients have provided actual consent to the collection and use of their personal information for the purpose of entering the information into the Database, for the mailings and for the purpose of marketing. However, Endermologie concedes that some individuals may not have actually provided consent and there may be some errors in the Database.

[para 68] Endermologie's argument relies on the Patient History Form as the mechanism by which patients at the Clinic provided consent. The Patient History Form says, "[W]ould you like to be added on too [sic] our mailing list?" This is the full extent of what Endermologie describes as "consent".

[para 69] The title of the form is "Patient History", which infers collection and use for the purpose of providing health services. At the beginning of the 40 questions, the Patient History Form states that the information is being collected as "part of your evaluation". In my view, *if* this Patient History Form is consent at all, the consent extends only to collection and use of personal information within the Clinic for the sole purpose of providing health services.

[para 70] Additionally, the Patient History Form does not indicate what personal information is to be collected or used. The Patient History Form does not explain what being added to the mailing list means. There is no mention of collection or use for a purpose different from the provision of health services, such as marketing. There is no mention of a shared Database, disclosure by the Clinic or collection or use by other organizations.

[para 71] The Database began in 2000, whereas the Patient History Form was initiated in 2004. The Patient History Form was only completed by patients when and if those individuals ever returned to the Clinic. Endermologie concedes that there may be some patients in the Database who never returned to the Clinic or who never completed the Patient History Form or who may have been erroneously entered into the Database.

[para 72] I accept the Complainant's submission that she opted out of the Database on the Patient History Form with a "No" choice, and thereby, explicitly refused consent to even be added onto the mailing list. The Complainant did *not* provide consent to collection, use or disclosure of her personal information for purposes of the mailing list or the Database. The Complainant did *not* give consent for the purpose of marketing.

[para 73] In my view, the Complainant explicitly refused consent, and therefore, did not give actual consent for the collection or use of her personal information for the purposes of being added onto the mailing list, mailings or marketing. Consequently, I find that there is no actual consent for collection or use for the mailing list, for the mailings or for marketing under section 8(1) of PIPA.

Deemed consent

[para 74] Section 8(2) of PIPA says there is deemed consent to collection or use of personal information for a particular purpose if the individual voluntarily provided the information for that purpose and if it is reasonable that a person would voluntarily provide that information. I accept the submission of the Complainant that she did *not* voluntarily provide the information for purposes of being added onto the mailing list, or for being sent the mailings or for marketing.

[para 75] I also accept the submission of the Complainant that the only purpose for which she voluntarily provided the information was for the purpose of receiving health services from her treating physician. Consequently, I find that in the circumstances of this case there is no deemed consent for the personal information to be collected or used for the purposes of being added onto the mailing list, for being sent any mailings or for marketing under section 8(2) of PIPA.

Conclusion

[para 76] Therefore, I find that Endermologie, through Corona, did not collect or use the personal information in the Database pursuant to the authority of either actual consent under section 8(1), or alternatively, with deemed consent under section 8(2) of PIPA. Consequently, there was no actual or deemed consent for the collection or use of the personal information under section 8 of PIPA. For these reasons, I find that Endermologie did not collect and use the Complainant's personal information in accordance with section 7(1) of PIPA.

ISSUE L: DID THE ORGANIZATION COLLECT THE PERSONAL INFORMATION DIRECTLY FROM THE COMPLAINANT (DIRECT COLLECTION)?

ISSUE M: IF THE ORGANIZATION DID NOT COLLECT THE PERSONAL INFORMATION DIRECTLY FROM THE COMPLAINANT, WAS THE COLLECTION IN ACCORDANCE WITH SECTION 12 (INDIRECT COLLECTION WITHOUT CONSENT)?

[para 77] PIPA says:

12 An organization may without the consent of the individual collect personal information about an individual from a source other than that individual if the information that is to be collected is information that may be collected without the consent of the individual under section 14, 15 or 22.

[para 78] Section 12 of PIPA authorizes indirect collection of personal information without consent in certain circumstances, including pursuant to the authority of section 14 of PIPA. It is not in dispute that Corona collected the personal information through the shared Database and that this is an indirect collection. Therefore, this was an

indirect, rather than a direct collection, as Corona collected the personal information from a source other than the Complainant.

[para 79] Due to the finding that this was an indirect collection of personal information without consent, this situation falls under section 12 of PIPA. I said that I accept the submission of Corona that section 14 does not apply in the facts of this case. Therefore, I find that the indirect collection without consent is not authorized under section 12 of PIPA.

ISSUE I: DID THE ORGANIZATION COLLECT THE PERSONAL INFORMATION IN ACCORDANCE WITH SECTION 13 OF PIPA? IN PARTICULAR, WAS THE ORGANIZATION REQUIRED TO PROVIDE, AND IF SO DID IT PROVIDE, NOTIFICATION IN ACCORDANCE WITH SECTION 13 OF PIPA (NOTIFICATION REQUIRED FOR COLLECTION)?

[para 80] The relevant parts of section 13 of PIPA say:

13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally

- (a) as to the purposes for which the information is collected, and
- (b) of the name of a person who is able to answer on behalf of the organization the individual's questions about the collection.

13(2) Before or at the time personal information about an individual is collected from another organization with the consent of the individual, the organization collecting the information must notify the organization that is disclosing the information that the individual has consented to the collection of the information.

13(3) Before or at the time personal information about an individual is collected from another organization without the consent of the individual, the organization collecting the information must provide the organization that is disclosing the personal information with sufficient information regarding the purpose for which the personal information is being collected in order to allow the organization that is disclosing the personal information to make a determination as to whether that disclosure of the personal information would be in accordance with this Act.

13(4) Subsection (1) does not apply to the collection of personal information that is carried out pursuant to section 8(2).

[para 81] Endermologie says that the information was collected in accordance with section 13(1) of PIPA because the Patient History Form provided notification to patients at the time of collection. However, there is no evidence before me to show that the Clinic patients were provided with notification about the purposes for which the information was being collected under section 13(1)(a) or with the name of a person who could answer questions on behalf of the organization under section 13(1)(b) of PIPA.

[para 82] The Patient History Form merely asks whether a patient wants to be added to the mailing list. The Patient History Form does not give any notification about collection for purposes of marketing. The notification requirements in section 13(1) do not apply where there is deemed consent under section 8(2) of PIPA. However, I said there is no deemed consent under section 8(2) of PIPA, so Corona is not excused from the notification requirements in section 13(1) by virtue of section 13(4) of PIPA.

[para 83] Additionally, in my view, section 13(1) does not apply to the facts of this case, because section 13(1) pertains only where there is a direct collection from the individual. Therefore, I do not accept Endermologie’s submission that the collection was in accordance with section 13 because section 13(1) of PIPA was satisfied. In my view, section 13(2) of PIPA does not apply, because there is no consent.

[para 84] Section 13(3) is the provision under section 13 of PIPA that applies in the facts of this case. However, there is no evidence before me to show that Corona, as the collecting organization, provided Dr. L. with the information required under section 13(3) of PIPA. For all of the above reasons, I find that Corona did not collect the personal information in accordance with section 13 of PIPA.

ISSUE J: DID THE ORGANIZATION COLLECT, USE OR DISCLOSE THE PERSONAL INFORMATION IN ACCORDANCE WITH SECTION 11(1), SECTION 16(1) AND SECTION 19(1) OF PIPA (COLLECTION, USE AND DISCLOSURE FOR PURPOSES THAT ARE REASONABLE)?

ISSUE K: DID THE ORGANIZATION COLLECT, USE OR DISCLOSE THE PERSONAL INFORMATION IN ACCORDANCE WITH SECTION 11(2), SECTION 16(2) AND SECTION 19(2) OF PIPA (COLLECTION, USE AND DISCLOSURE TO THE EXTENT REASONABLE FOR MEETING THE PURPOSES)?

[para 85] Sections 11 and 16 of PIPA read:

11(1) An organization may collect personal information only for purposes that are reasonable.

11(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.

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

16(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.

[para 86] PIPA describes the standard for determining what is “reasonable” as:

2 Where in this Act anything or any matter

(a) is described, characterized or referred to as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

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

[para 87] PIPA describes its purpose as:

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

[para 88] The Complainant did not address whether the collection and use of her personal information was for purposes that were reasonable, or to the extent that was reasonable for meeting the purposes, under sections 11 and 16 of PIPA. Endermologie argued that marketing was a reasonable purpose and that the collection and use was only to the extent that was reasonable for meeting that purpose under sections 11 and 16 of PIPA. Endermologie said that it believes the individuals would have provided the information under section 2 of PIPA.

Reasonable Purposes

[para 89] Sections 11(1) and 16(1) of PIPA allow an organization to collect and use personal information only for purposes that are reasonable. It is not in dispute that the purpose for Corona's collection and use of the Complainant's personal information from the Database was for the purpose of marketing.

[para 90] Section 2 of PIPA says that the standard for determining whether a thing or matter is reasonable is what a reasonable person would consider appropriate in the circumstances. Section 3 of PIPA says that the purpose of PIPA is to achieve a balance between the right of individuals to have personal information protected and the need of organizations to collect, use and disclose personal information for purposes that are reasonable.

[para 91] In determining whether the purposes are reasonable under PIPA, all of the relevant circumstances of the case must be considered. I must consider and apply the standard, which is "what a reasonable person would consider appropriate in the circumstances." This is an objective standard and does not include the subjective preferences of the particular individual. Rather, this standard is what a reasonable person in the circumstances of the case would find appropriate.

[para 92] In this case, the personal information at issue was provided in the context of a patient obtaining health services from her treating physician. The individual did not consent and expressly refused consent to be added onto the Clinic mailing list. The individual did not consent to collection and use for purposes of marketing. On the facts

of this case, in my view, a reasonable person would *not* consider the purposes appropriate in the circumstances under section 2 of PIPA.

[para 93] I have considered the balance to be achieved under the purposes of PIPA. When weighing the factors to be considered under section 3 of PIPA in light of the facts of this case, I do *not* find the purpose of marketing to be reasonable when balancing the purposes of PIPA for protecting the personal information of individuals versus meeting the needs of organizations to collect and use personal information.

[para 94] In my view, in this case, a “reasonable person” would *not* consider marketing without consent and without any other authority under PIPA to be an appropriate purpose or a reasonable purpose. Therefore, I find that Endermologie, through Corona, did not collect and use the personal information for purposes that are reasonable under section 11(1) and section 16(1) of PIPA.

Extent Reasonable

[para 95] Sections 11(2) and 16(2) of PIPA allow an organization to collect and use personal information only to the extent that is reasonable for meeting the purposes for which the information is collected and used. The only personal information that Corona collected and used is name and mailing address, which is a minimal amount of personal information. However, I said that the personal information was provided solely for the purpose of obtaining health services, not for the purpose of marketing.

[para 96] In my view, the above considerations weigh in favour of a finding that a reasonable person would consider the personal information to be collected and used beyond the extent that is reasonable for meeting the purposes for which the information was collected. Additionally, since the purpose for collecting and using the personal information was not reasonable under sections 11(1) and 16(1) of PIPA, respectively, the extent of collecting and using the personal information cannot be reasonable under sections 11(2) and 16(2), respectively.

[para 97] Therefore, I find that the collection and use of the personal information was beyond the extent that is reasonable for meeting the purposes for which the information was collected and used under sections 11(2) and 16(2) of PIPA. For all of the above reasons, I find that Endermologie has not discharged its burden of proof under Issues B through F to show that any collection and use is in accordance with PIPA.

VII. ORDER

[para 98] I make the following Order under section 52 of PIPA:

- I find that:

ISSUE A: Neither party has the burden of proof for the definitional issues (personal information, organization, collect and use);

ISSUE B: The Organization has the burden of proving that any collection or use was in accordance with section 7(1) of PIPA. In particular:

- The Organization has the burden of proving that any collection or use without consent was permitted by section 14 or section 17 of PIPA; and
- Alternatively, if the Organization does not have the authority to collect or use without consent, the Organization has the burden of proving that any collection or use was permitted with consent in accordance with section 8 of PIPA;

ISSUE C: The Organization has the burden of proving that notification was not required, or alternatively, that it provided notification in accordance with section 13 of PIPA;

ISSUE D: The Organization has the burden of proving that any collection or use was reasonable under section 11(1) and section 16(1) of PIPA;

ISSUE E: The Organization has the burden of proving that any collection or use was reasonable under section 11(2) and section 16(2) of PIPA;

ISSUE F: The Organization has the burden of proving that the personal information was collected directly, or alternatively, that it collected the personal information indirectly in accordance with section 12 of PIPA;

ISSUE G: The "Organization" "collected" and "used" the "personal information", as these terms are defined in PIPA;

ISSUE H: The Organization did not collect and use the personal information in accordance with section 7(1) of PIPA (no collection or use without either authorization or consent). In particular:

- The Organization did not have the authority to collect and use the personal information without consent, as permitted by section 14 and section 17 of PIPA (authorization for collection and use without consent); and
- The Organization did not have the authority to collect and use the personal information with consent to collect and use the personal information in accordance with section 8 of PIPA (collection or use with consent);

ISSUE I: The Organization did not collect the personal information in accordance with section 13 of PIPA (notification required for collection);

ISSUE J: The Organization did not collect and use the personal information in accordance with sections 11(1) and section 16(1) of PIPA (collection and use for purposes that are reasonable);

ISSUE K: The Organization did not collect and use the personal information in accordance with section 11(2) and section 16(2) of PIPA (collection and use to the extent reasonable for meeting the purposes);

ISSUE L: The Organization did not collect the personal information directly from the Complainant (direct collection); and

ISSUE M: The Organization collected the personal information indirectly and did not collect the information in accordance with section 12 (indirect collection without consent).

- Pursuant to section 52 of PIPA, I order the Organization to:
 - Stop collecting and using the personal information of patients in the Database for purposes of marketing in contravention of PIPA; 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