

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2020-05

July 27, 2020

DIVERGENT HEALTH CARE LIMITED

Case File Number 006097

Office URL: www.oipc.ab.ca

Summary: In the course of divorce proceedings, the Complainant underwent paternity testing to determine if he was the father of his daughter. Divergent Health Care Limited (the Organization), performed the test. The Complainant's (now) former wife was his daughter's legal guardian at the time of the test. Since his daughter was a minor, his former wife provided consent for his daughter to participate in the test. The lawyer representing the Complainant's former wife (the/her lawyer) arranged the test with the Organization. Per its standard practice, the Organization released the results of the test to the Complainant and his former wife. The Organization further disclosed the results directly to the lawyer.

The Complainant complained to the Office of the Information and Privacy Commissioner that the Organization disclosed his personal information, without consent, in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (PIPA).

The Adjudicator found that information confirming the Complainant's relation to his daughter was jointly the Complainant's and his daughter's personal information. The Adjudicator found that while the Complainant's former wife had authority to consent to disclosure of his daughter's personal information under section 61(1)(c) of PIPA as her guardian, that authority did not extend to consent to disclosure of the Complainant's personal information, even for personal information that was jointly the Complainant's and his daughter's.

The Adjudicator found that the Organization collected the Complainant's personal information for the particular purpose of conducting its business of paternity testing, as usual. Disclosure to the lawyer, or to anyone for the purposes of a legal proceeding was not included in that particular purpose. Therefore, per section 8(4), section 8(2) could not be construed to allow it. The same reasoning applied regarding the Organization's authority to disclose personal information under section 8(3) of PIPA.

The Adjudicator found that the Complainant is deemed to have consented to disclosure of some of his personal information to his former wife, under section 8(2), for the purpose for which his personal information was collected. The Adjudicator found that the Complainant was not deemed to consent to disclosure of genetic information about his alleles. Given that disclosing it was not necessary to determine paternity, the Complainant did not voluntarily provide his genetic information for the purposes of disclosure as required by section 8(2)(a).

The Adjudicator found that the Organization did not give proper notice under section 8(3) that it would disclose the Complainant's genetic information. Even if it had, given the sensitivity of that information, disclosure was not reasonable under section 8(3)(c).

The Adjudicator found that the Organization did not in fact disclose the Complainant's personal information to either his former wife or her lawyer for the purposes of a legal proceeding within the terms of section 20(m). Even had that been the case, he found that it would not have been reasonable for the Organization to disclose the Complainant's personal information under section 20(m) for the purposes of legal proceedings between the Complainant and his former wife. There was no nexus between the Organization and the legal proceedings, the Organization did not need to disclose the Complainant's personal information for the purposes of a legal proceeding in order to carry out its functions, and it did not – and was not in position to – reasonably weigh the sensitivity of the information and the consequences of its disclosure to the parties against the utility of the information to the legal proceedings. Disclosing information for the purposes of a legal proceeding was therefore unreasonable.

The Adjudicator found that, with the exception of the Complainant's genetic information, disclosure of his personal information to his former wife as part of providing paternity testing services was for a reasonable purpose under section 19(1), and to a reasonable extent under section 19(2). Since disclosing the Complainant's genetic information was not necessary to inform the Complainant's former wife about the results of the paternity test, disclosure of it was not for a reasonable purpose under section 19(1) and went beyond a reasonable extent under section 19(2).

Since there was no reasonable purpose for it to disclose information to the lawyer, the Adjudicator found that disclosure to the lawyer was unreasonable under section 19(1), and beyond a reasonable extent under section 19(2).

The Adjudicator ordered the Organization to cease disclosing information in contravention of PIPA.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss: 1(1)(k); 2; 3; 7(1); 8(1), (2), (3), and (4); 13(1); 19; 20(m); 52; 59(1)(a); 60; 61(1)(c)

Authorities Cited: AB: Orders P2008-010, P2010-018, P2013-07, P2015-04, P2017-05, P2017-08, P2018-09, P2020-03

I. BACKGROUND

[para 1] In the course of going through the divorce process, in order to resolve any questions about his status as the father of his daughter, the Complainant elected to undergo paternity testing. The test was carried out by Divergent Health Care Ltd. (the Organization). The Complainant's daughter was a minor at the time, and his (now) former wife, as her guardian, was required to provide consent to the test on her behalf.

[para 2] The Complainant initially scheduled an application in court to compel his former wife to cooperate with the test. The court application was adjourned *sine die* and never took place since the Complainant's former wife agreed to the testing beforehand. The Complainant agreed to pay the cost, and his former wife agreed to reimburse him in the event that he was not the biological father. The lawyer representing the Complainant's former wife (the/her lawyer) booked the testing for all of them and informed the Complainant of the date and time by e-mail.

[para 3] In the time leading to the test, the Complainant was subject to, and in the process of challenging the validity of, an Emergency Protection Order (EPO) restricting contact with his former wife. Despite this obstacle, the Complainant and his former wife agreed to arrangements for the test, via her lawyer.

[para 4] As arranged, the Complainant and his daughter provided DNA samples to the Organization in order to carry out the test.

[para 5] The test found that the Complainant is his daughter's father. The results and the basis for them are contained in a paternity test report (the Report). The Organization provided the Complainant with a Case ID and passcode permitting him to access the Report on-line. The Complainant's former wife, as guardian of his daughter, was also provided the Case ID and passcode. Providing the results to both parties is the Organization's standard practice. Beyond that, the Organization provided the Case ID and passcode directly to the lawyer, during a telephone call. The lawyer revealed this fact to the Complainant during an encounter at the Calgary Court Centre. Subsequently, he received a letter from the lawyer that included the entire Report.

[para 6] Through discussions with the Organization about disclosure to the lawyer, the Complainant learned that the lawyer had contacted it numerous times regarding the outcome of the test. The Organization does not dispute this point.

[para 7] The Organization also stated that the Complainant's former wife orally provided her consent for the Organization to disclose the test results directly to her

lawyer on the day of the test, and provided written consent later. The Complainant contests the validity of the consent¹, and notes that the Organization did not have *his* consent to disclose the test results.

[para 8] The Complainant complained to this office that the Organization disclosed his personal information contrary to the *Personal Information Protection Act* S.A. 2003 c. P-6.5 (PIPA). Investigation and mediation did not resolve the matter, so it proceeded to an inquiry.

II. ISSUES

[para 9] The issues identified in the Notice of Inquiry, are as follows:

- 1. Did the Organization disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular,**
 - a. Did the Organization have the authority to disclose the information without consent, as permitted by section 20 of PIPA?**
 - b. If the Organization did not have the authority to disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before disclosing the information? In particular,**
 - i. Did the individual consent in writing or orally? or**
 - ii. Is the individual deemed to have consented by virtue of the conditions in section 8(2)(a) and (b) having been met? or**
 - iii. Is the collection, use or disclosure permitted by virtue of the conditions in section 8(3)(a), (b) and (c) having been met?**
- 2. Did the Organization disclose the information contrary to, or in accordance with, section 19(1) of PIPA (disclosure for purposes that are reasonable)?**
- 3. Did the Organization disclose the information contrary to, or in accordance with, section 19(2) of PIPA (disclosure to the extent reasonable for meeting the purposes)?**

¹ The Complainant contests the validity of the written consent form, arguing that it was signed and produced only for the purposes of this inquiry. The Organization counters that the accusation is baseless. While it is odd that the Organization would obtain written consent after the test was completed, likely around the time when the Complainant learned about disclosure, I do not need to explore this point further. As is noted throughout this Order, even if the consent is valid, it does not affect the outcome of the case.

III. DISCUSSION OF ISSUES

1. Did the Organization disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

[para 10] Section 7(1)(d) limits the circumstances under which an organization may disclose personal information:

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

(d) disclose that information unless the individual consents to the disclosure of that information.

[para 11] I first consider whether the information in question is personal information.

[para 12] PIPA defines “personal information” in section 1(1)(k) as, “information about an identifiable individual.”

[para 13] The Organization was not entirely forthright about to what information the Case ID and passcode provide access. In response to my request for an exact copy of the information available with the Case ID and passcode, the Organization only stated that they permit access to “essentially the whole report” meaning paternity test report (the Report). I note, however, that a letter to the Complainant from the lawyer contained the Report as an attachment. Thus, I conclude that by providing the Case ID and passcode to the lawyer and the Complainant’s former wife, the Organization disclosed the entire Report to them. The personal information at issue in this case is that which appears in the Report.

[para 14] The Report contains significant pieces of information, including the following:

- The Complainant’s name
- The results of the test establishing paternity (the conclusion that the Complainant is his daughter’s father)
- The identity of his daughter
- Genetic Information describing the loci of the Complainant’s alleles.² (Genetic Information)

² Alleles are variations of genes. To determine the likelihood of paternity, the Complainant’s alleles were compared to his daughter’s. The loci of the alleles is described in alphanumeric code on the Report, under the column headed “Locus”. The Organization stated that it was not qualified to give a description of the codes that appear in the Report. Accordingly, there is no evidence of exactly what the loci describe about the Complainant or his daughter. However, it is evident that they permit determination of whether one person is related to another, and as such, this information is about both individuals, and they are identifiable by it. It is their personal information.

[para 15] The above information is about the Complainant, and he is identifiable from it. It is the Complainant's personal information. I note that information describing the relation between the Complainant and his daughter is also his daughter's personal information. The information connecting the two of them as father and daughter is both of theirs, jointly.

[para 16] I now consider whether the Organization complied with section 7(1) when it disclosed the Complainant's personal information. Determining whether the Organization complied with section 7(1) depends upon whether,

- The Complainant consented to or, is deemed to have consented to, disclosure (sections 8(1) and (2)),
- It was permitted to disclose the information upon giving proper notice about the purposes for disclosure (section 8(3)), or;
- It had authority to disclose information without consent for the purposes of a legal proceeding. (section 20)(m)).

[para 17] I will deal with issues about consent, deemed consent, and permission to disclose information upon proper notice first. These are the matters raised in **Issue 1(b)**, above.

b. If the Organization did not have the authority to disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before disclosing the information? In particular,

i) Did the individual consent in writing or orally?

[para 18] The Complainant did not consent to the release of his personal information.

ii) Is the individual deemed to have consented by virtue of the conditions in section 8(2)(a) and (b) having been met?

[para 19] Section 8(2) is reproduced below:

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

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

[para 20] The application of section 8(2) is guided by section 8(4):

(4) Subsections (2), (2.1), (2.2) 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.

Consideration of Section 8(4)

[para 21] The Organization does not explicitly state any particular purpose for which it collected the Complainant's personal information. It is evident though that as a paternity testing company engaged by the Complainant and his former wife to determine paternity, it collected the Complainant's personal information for the particular purpose of carrying on its business of providing paternity testing services to them. Indeed, determining paternity was the reason that the Complainant, his former wife and her lawyer contacted the Organization.

[para 22] Performing the test involved disclosing the results to the Complainant and his former wife. This was the Organization's standard practice, about which it informed them in advance of the test. The Organization maintains, and the Complainant does not contradict, that on numerous occasions, it informed the Complainant that it would share the paternity test results with his former wife, as his daughter's guardian.

[para 23] In light of the above, I find that the Organization's particular purpose of providing paternity testing services included disclosing the results to the Complainant's former wife. Doing so was business as usual. I also note that notification of the purposes for collection of personal information is required under section 13(1) of PIPA.

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

(a) as to the purposes for which the information is collected, and

(b) of the name or position name or title of a person who is able to answer on behalf of the organization the individual's questions about the collection.

[para 24] I also find that the Organization's standard practices do not include disclosure to the lawyer by the Organization. Disclosure to anyone other than the parties to the testing, is left to the parties. The Organization stated,

We would like to also mention that our policy when performing a paternity test is that both parties being tested are entitled to their results. How they would like to distribute the results is up to them.

[para 25] Since the Organization's standard practice does not include disclosure to the lawyer, neither does the particular purpose for collecting the Complainant's personal information.

[para 26] Indeed, disclosure to the lawyer took place as a result of a different policy, other than the standard one described above. The Organization stated,

We would like to also point out that when a paternity test conducted is legal, it is our policy to provide both individuals with their test results and to anyone designated by the authorized individual entity, as per the Personal Information and Privacy Act (PIPA) section 7(1)(d).

[para 27] Here, I understand the Organization asserts that its practices include disclosing test results to anyone to whom a party to testing is authorized to consent to disclosure when its clients are involved in legal proceedings (the legal disclosure policy). However, the circumstances of this case indicate that it did not collect, and cannot be considered to have collected, personal information from the Complainant for the particular purpose of making such a disclosure.

[para 28] The legal disclosure policy is contrary to the breadth of disclosure contemplated by the Organization's standard practice, which was communicated to the parties to the test. The Organization does not state that it disclosed the legal disclosure policy to the parties to the test in advance of it, and it is clear that the Complainant did not agree to disclosure to the lawyer. If it had been collecting the Complainant's personal information for this purposes, presumably it would have notified the parties to the test of that possibility, just as it did for its standard practices.

[para 29] Further, consent to disclose the Report to the lawyer was an arrangement only between the Complainant's former wife and the Organization. Prior to this inquiry, the Complainant does not even seem to have been aware of the arrangement. Seen in this light, disclosing the Report to the lawyer was simply something the Organization did after the fact of collecting the Complainant's personal information, rather than a purpose for which collection was contemplated. That the Organization did so as a matter of (undisclosed) policy does not change that conclusion. To the contrary, it is precisely the sort of practice (disclosure for purposes other than the communicated purpose for collection) that sections 13(3) and 8(4) are intended to prevent. That the Organization later acquiesced to the former wife's request to disclose information directly to the lawyer, does not retroactively inform the purposes for which the Complainant's personal information was collected.

[para 30] Finally, whether or not it included disclosure upon consent from one of the parties to the testing, disclosure to the lawyer was beyond the particular purpose for collection, in any case. The legal disclosure policy contemplates disclosure upon consent from "authorized individuals", which the Complainant's former wife was not.

[para 31] The Organization's position is that since the Report also contained the Complainant's daughter's personal information, as her guardian, the Complainant's

former wife had the right to consent to disclosure on her behalf, per section 61(1)(c) of PIPA³, reproduced below:

61(1) Any right or power conferred on an individual by this Act may be exercised

(c) if the individual is under 18 years of age but does not meet the criterion in clause (b), by the guardian of the individual;

[para 32] However, section 61(1)(c) does not allow the Complainant's former wife to consent to the release of the Complainant's personal information since she is not *his* guardian. This includes information that is jointly the Complainant's and his daughter's. Consent from the Complainant's former wife was thus inadequate to permit disclosure of his personal information. As such, she was not an "authorized individual" to consent to disclosure of the Complainant's information, and disclosure to anyone on that basis is not within the particular purpose for which the Organization collected the Complainant's personal information.

[para 33] Lastly under this heading, I consider that the Organization argues that once consent was given, *failing* to disclose information to the lawyer was a contravention of PIPA. Disclosing the information was, therefore, necessary in order to fulfill a legal obligation.

[para 34] In my view, if the Organization had a legal obligation to disclose the Complainant's personal information, it stands to reason that it would have collected it for that purpose as well, in order to comply with the law. However, there was no such legal obligation in this case.

[para 35] The Organization bases its conclusion that it had a legal obligation on the premise that since section 7(1)(d) permits disclosure where consent is given, once consent was given, it had to disclose the Complainant's personal information. This argument is incorrect.

[para 36] Consent may *permit* an organization to disclose information pursuant to section 7(1)(d), but does not create a legal *obligation* for an organization to do so; and where no legal obligation exists, an organization cannot collect personal information for the purposes of fulfilling it.

[para 37] In light of the above, the Complainant cannot be deemed to have consented to disclosure to his former wife's lawyer. That was not a particular purpose for which the Organization collected the Complainant's personal information, and section 8(4) prohibits construing section 8(2) in any manner that would permit it.

³ In its submission, the Organization erroneously cites section 84(1)(e) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000 C. F-25 (FOIP) for this argument. That section discusses exercising rights on behalf of a minor. It is inapplicable to the Organization since PIPA, not, FOIP governs its actions in this case. Section 61(1)(c) of PIPA is the counter-part (though not identical) to section 84(1)(e). It discusses exercising rights on behalf of a minor under PIPA.

[para 38] Section 8(4) also prohibits a finding under section 8(2) that the Complainant is deemed to have consented to disclosure (to anyone) for the purposes of a legal proceeding. As discussed in detail under consideration of the Organization's authority to disclose information under section 20(m) in **Issue 1(a)**, the presence of legal proceedings between parties to a paternity test is irrelevant to providing paternity testing services. As such, disclosing personal information for the purposes of a legal proceeding is not part of the particular purpose for which the Organization collected the Complainant's personal information. That purpose remains providing paternity testing services to the Complainant and his former wife, nothing more.

[para 39] In sum, having engaged the Organization in order to obtain its business-as-usual services, the Complainant cannot be deemed to consent to disclosure outside of the Organization's stated usual parameters. Accordingly, the remainder of the discussion of section 8(2) focusses on whether the Complainant is deemed to have consented to disclosure of his personal information to his former wife, for the particular purpose for which the Organization collected it.

Consideration of Section 8(2)(a)

[para 40] Under section 8(2)(a), deemed consent can only be found in relation to personal information that the individual it is about has voluntarily provided, for a particular purpose. I consider each requirement in turn, below.

Was the information voluntarily provided?

[para 41] While it is clear that the Complainant voluntarily provided his own name and a DNA sample to the Organization, there is a question about whether he, or anyone, voluntarily provided the results of the test establishing paternity and the identity of his daughter. That information was determined by the test, and no one, including the Complainant, expressly had it beforehand.

[para 42] I find, however, that in the particular circumstances of this case, the Complainant voluntarily provided the personal information about him in the Report as required under section 8(2)(a).

[para 43] The Complainant was aware that the paternity test would reveal information about his relation with his daughter. Knowing this, the Complainant covered the cost of the test and collaborated with his former wife in order to bring this information to light. Between them, the requisite DNA samples and consent to testing on behalf of his daughter were provided to the Organization.

[para 44] Reciprocally, the Organization received consent, DNA samples, and payment in order to conduct the paternity test.

[para 45] In my view, once the Organization had the means, material, and mandate to determine the question of paternity, the results of the test establishing paternity had

effectively been provided to it. At that point, it was only a matter of applying the Organization's expertise to determine the precise content of the outcome of the test. By knowingly playing his part to bring about the outcome of the test, the Complainant voluntarily provided the information along with his former wife, and his daughter.

[para 46] I now consider the particular purposes for which the Complainant provided the information and for which the Organization disclosed it.

The Parties' Submissions re: the purpose for providing and disclosing information

[para 47] The Complainant did not explicitly state the purpose for which he provided information to the Organization, and the Organization did not explicitly state the purpose for which it disclosed the information. Therefore, I am left to determine each party's purpose through consideration of their circumstances and the objective of carrying out the paternity test in those circumstances.

For what purpose did the Organization disclose the information to the Complainant's former wife?

[para 48] The Organization's purpose for disclosing the information to the Complainant's former wife was to inform her of the results of the paternity test. Since she was the guardian of the Complainant's daughter at the time of the test, per the Organization's standard practices, she was entitled to the results. The particular purpose for which the Organization collected the Complainant's personal information encompasses this disclosure.

For what purpose(s) did the Complainant provide the information?

[para 49] When considering the Complainant's purposes, I am guided by the description of how section 8(2) applies given in Order P2013-07, at para 39:

Section 8(2) is intended to "deem" consent in situations in which it is obvious to the individual providing the information that the organization is collecting, using or disclosing the personal information, for a particular purpose. It also only applies where it is reasonable for an individual to volunteer the information for that purpose.

[para 50] The Complainant describes that he is the one who, "initiated, organized, paid for, and consequently been interested in," the paternity test.⁴ The Complainant adamantly asserts that it was his paternity test. He states that paternity testing was his idea (not his former wife's), and that when he pursued it, he was not considering using the results in any legal proceeding. Rather, he sought the test for "personal reasons." He had become curious about his relationship to his daughter, and felt that paternity testing was a good

⁴ The Organization argues that the lawyer initiated the test, since he contacted the Organization to schedule it. I find that the Complainant is the one who initiated it, and that it was his idea, since he brought a court application to compel the test prior to the Organization's involvement.

idea “just in case” and “good to have as a secondary factor.” The Complainant does not explicitly state how or to what the testing is a secondary factor, but I infer from the context in which the testing arose, that it was something he felt was important to know while challenging the EPO, and going through a divorce. Knowing his true relation to his daughter was information useful to help guide his decisions in those matters.

[para 51] In light of the above, it seems to me that the purpose for which the Complainant provided the information was simply to determine if he was his daughter’s father. In other words, to acquire the Organization’s paternity testing services.

[para 52] The remaining issue is whether, under the circumstances, by providing information for the purposes of determining paternity, the Complainant also provided the information for the purpose of informing his former wife.

Did the Complainant provide his personal information for the purpose of disclosure to his former wife?

[para 53] I infer that it is the Complainant’s position in this inquiry that he did not provide any information for the purpose of disclosing it to his former wife. However, a review of the circumstances surrounding the test indicates that, with the exception of his genetic personal information, he must have provided it for that purpose. In light of the differing results, I discuss the Complainant’s genetic information separately from the rest of his personal information.

Personal Information other than genetic information

[para 54] The Complainant’s personal information was not, on its own, sufficient to determine the question of paternity; his daughter’s DNA was required as well. Since his daughter’s DNA was required, so was his former wife’s consent as her guardian. The Complainant was not working alone or in secret when he set out to determine paternity. Further, his daughter and his former wife would have had an interest in the outcome of the test as well. Despite the background divorce process, they all collaborated to see the test carried out. The Complainant also knew in advance of the test that the Organization’s practice was to disclose the test results to his former wife.

[para 55] In light of the above, it was obvious to the Complainant, and he must have understood, that his former wife would receive the test results; including the information that established paternity, and the identity of his daughter, including his name. Yet, despite this, he proceeded with the test, nevertheless. The Complainant may have preferred not to have his former wife receive this information, but knowing that such an outcome was necessary to obtaining the test, he must have provided the information for that purpose. It was a necessary outcome that he had to accept, in order to get what he wanted.

The Complainant's Genetic Personal Information

[para 56] I do not find that the same can be said of the Complainant's genetic information. The Complainant had to provide a DNA sample containing this information in order for the test to be carried out. Providing it was necessary only to that extent, and the Complainant does not appear to have been made aware that this information would be included in the Report, or shared at all. Unlike disclosure of other personal information, disclosing this information to his former wife was not a necessary or obvious outcome that the Complainant can be understood to have accepted.

Conclusion about section 8(2)(a)

[para 57] The Complainant voluntarily provided personal information, other than his genetic information, for the purposes of disclosing it to his former wife. The Organization has satisfied section 8(2)(a) in respect of disclosure of that information to his former wife.

[para 58] The Complainant did not provide his genetic information for the purposes of disclosing it to his former wife, and is not deemed to have consented to disclosure of it to her. The Organization has not satisfied section 8(2)(a) in respect of disclosure of that information to his former wife.

[para 59] I now turn to considering whether it was reasonable for the Complainant to voluntarily provide the information to the Organization under section 8(2)(b).

Consideration of section 8(2)(b)

[para 60] Section 8(2)(b) specifies that deemed consent to disclosure of information is limited to circumstances where it is reasonable that a person would voluntarily provide the information.

[para 61] My conclusions here mirror those under section 8(2)(a). I find that the requirements for deemed consent to disclosure to the Complainant's former wife under section 8(2)(b) are met regarding most of the personal information, but not the Complainant's genetic information.

Personal Information other than genetic information

[para 62] It is reasonable that the Complainant provided the information that established paternity, and the identity of his daughter, including his name, for the purpose of sharing it with his former wife. This is the information in which the Complainant, his former wife, and their daughter all had a common interest. Disclosing this information to his former wife was necessary in order for testing to be carried out.

The Complainant's Genetic Personal Information

[para 63] Since the Complainant had to provide a DNA sample containing this information in order for the test to be carried out, providing it was reasonable for the purpose of determining paternity. This does not mean, however, that providing such information is reasonable for the purposes of disclosure to an adverse party in the context of a divorce process, or to anyone.

[para 64] As demonstrated by the Report, a person, and their relatives, can be identified by their alleles. Anyone with the profile of the Complainant's alleles in the Report could compare it to another DNA test to determine if the other sample is the Complainant's, or a relative's. Details of the Complainant's private life, including where and when he was at a given time, and who his relatives are, can be determined this way. Once a person intent on carrying out such a comparison possesses the Report, there is no need to involve the Complainant, or even let him know. The information about the Complainant's alleles permits serious intrusion upon his privacy. For that reason, it is very sensitive information.

[para 65] In light of the foregoing, I cannot see how it is reasonable that the Complainant would voluntarily provide his genetic information for disclosure, when it may be put to such invasive and unknown uses, particularly when disclosing this information is not necessary to determining paternity.

Conclusion on deemed consent under section 8(2)

[para 66] I find that the Complainant is deemed to have consented to disclosure of his personal information to his former wife under section 8(2), except for his genetic information. I find that the Complainant is not deemed to have consented to disclosure of that information.

[para 67] Pursuant to section 8(4), the Complainant cannot be, and is not, deemed to consent to disclosure of any personal information to the lawyer, or to anyone for the purposes of a legal proceeding.

iii) Is the collection, use or disclosure permitted by virtue of the conditions in section 8(3)(a), (b) and (c) having been met?

[para 68] Section 8(3) states,

(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if

(a) the organization

(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and

(ii) *with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,*

(b) *the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and*

(c) *having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).*

[para 69] Like section 8(2), the application of section 8(3) is also guided by section 8(4). Since the particular purpose for which the Organization collected the Complainant's personal information did not include disclosure to the lawyer, section 8(3) cannot be construed to allow it. Similarly, it cannot be construed to permit disclosure for the purposes of a legal proceeding. Accordingly, I continue only to consider disclosure to the Complainant's former wife, for purposes other than a legal proceeding.

[para 70] As before, I consider the Complainant's genetic personal information apart from the rest of his personal information.

Personal Information other than genetic information

[para 71] With respect to disclosure to the Complainant's former wife, since I have already found that the Complainant is deemed to have consented to disclosure of this personal information under section 8(2), I do not need to consider whether the Organization also had authority to disclose that information to her under section 8(3).

The Complainant's Genetic Personal Information

[para 72] Here, I consider that perhaps it is arguable that by informing the Complainant that the test results would be shared with his former wife, the Organization made its purpose for disclosing the information – in order to inform her of the entirety of the results – known to him, and therefore provided notice as required under section 8(3)(a)(i). I find, however, that merely informing the Complainant that the results would be shared with his former wife is not specific enough to amount to notice of the intention to disclose this particular category of information. The Organization only informed the Complainant of its standard practice, and not of details about the nature of the information to be disclosed.

[para 73] Even if it had given notice within the terms of section 8(3)(a)(i), the Organization would still not have satisfied section 8(3)(c). For the same reasons given in the discussion about deemed consent, given the level of sensitivity of the information about the Complainant's alleles, it is not reasonable to disclose that information for the purposes of informing the Complainant's former wife of the results of the paternity test.

Accordingly, I find that the Organization was not authorized to disclose that information to the Complainant's former wife under section 8(3).

[para 74] I now consider the Organization's argument that it had authority to disclose information without the Complainant's consent under section 20(m).

a. Did the Organization have the authority to disclose the information without consent, as permitted by section 20 of PIPA?

[para 75] Section 20(m) states as follows:

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

(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding;

[para 76] The Organization contends that it was authorized to disclose the Complainant's personal information because it may be subpoenaed. Its initial submission on this point states:

Because this test was for the purpose of a legal determination of paternity the information could be subpoenaed. In this case as mentioned before the paternity test was organized by [the law firm representing the former wife].

[para 77] In the course of this inquiry, I asked the Organization how it determined that the information was intended to be used in a legal proceeding. The Organization stated,

We were informed by [the Lawyer] that a legal paternity test was required to prove paternity between [the Complainant's daughter] and [the Complainant] for the purpose of a possible court proceeding regarding a divorce. Our organization had no involvement in these proceedings and did not require further information.

[para 78] The Complainant's efforts to obtain paternity testing also had a legal dimension to them. The Complainant filed a motion in court to compel his former wife to cooperate with the testing. The motion was adjourned *sine die* by consent order when she agreed to do so.

[para 79] Under the circumstances, it is understandable that the Organization concluded that the test results were intended, in some way, for use in a legal proceeding.

[para 80] However, despite the presence of legal proceedings in the background to the test, I do not think that these circumstances indicate that disclosing the information was reasonable for the purposes of a legal proceeding under section 20(m). As discussed below, I find that the Organization did not disclose information for that purpose, and if it did, it was not reasonable to disclose information for that purpose.

Disclosure was not for the purposes of a legal proceeding

[para 81] In saying this, I note the Complainant took legal steps (the adjourned court application) to obtain his former wife's cooperation with the test. However, while there was a legal proceeding set to be heard on the issue, the Report was not for the purposes of that proceeding. It had not yet been prepared. The fact that the Report resulted from a legal proceeding does not create an inference that it was meant to be used in any other. Put another way, that legal proceeding was for the purposes of obtaining the Report; the Report was not for the purposes of that legal proceeding.

[para 82] Regarding the possibility that the Report might be used in future divorce proceedings, I do not believe that the Organization disclosed the Report for the purposes of those proceedings; either to the Complainant's former wife or to her lawyer.

Disclosure to the Complainant's former wife

[para 83] The Organization was not involved in the legal proceedings between the Complainant and his former wife; it was merely the paternity testing business that they engaged to determine the Complainant's relation to his daughter. The Organization's standard policy is to disclose the test results to the parties to the testing. The presence of legal proceedings makes no difference to that practice. I asked the Organization about its policy as to who may obtain access to test results if there was no legal proceeding involved; it answered as follows:

Our policy states that both parties getting the test are entitled to the results of the test whether it's legal or non-legal or even if a court proceeding is involved.

[para 84] In light of this, I find that when the Organization supplied the information to the parties to the testing, the Organization was simply fulfilling its obligation to provide them paternity testing services for which the Complainant paid. It was not itself providing the information for any purpose beyond that, legal proceedings or otherwise.

Disclosure to the Lawyer

[para 85] Disclosure to the lawyer took place under different circumstances than disclosure to the Complainant's former wife. The lawyer seems to have prompted the Organization to disclose the Report to him over the telephone in excess of its standard practice of disclosing the Report only to the parties to the testing. The lawyer appears to have led the Organization to the understanding that he desired the information for use in a legal proceeding. However, a lawyer's desire to acquire the test results for the purposes of a legal proceeding does not, on its own, lead to the conclusion that an organization disclosed it for that purpose. The entire circumstances of disclosure must be considered. In this case, despite the difference in some of the particulars of the circumstances of disclosure, disclosure to the lawyer was, in relation to the purposes for which the Organization disclosed the Report, fundamentally for the same purpose as disclosure to Complainant's former wife.

[para 86] Along with the Complainant, his former wife engaged the Organization to determine paternity. Although unknown to the Complainant, the Organization's legal disclosure policy included disclosure to anyone to whom the parties to the test consent. Accordingly, the Organization honoured its arrangement with the Complainant's former wife to disclose the Report to the lawyer, with her consent. Under these circumstances, it seems far more likely to me that when the lawyer called seeking the information, the Organization disclosed it as a matter of providing customer service to the Complainant's former wife, and not with a view to servicing the legal proceedings between them, to which it was a stranger and in which it was not invested. Put another way, by helping the lawyer, the Organization was serving its client, not its client's legal proceedings.

[para 87] While the converse is also possible, I believe that to the extent the Organization might have intended its disclosure to the lawyer (or to the Complainant's former wife) to be for the purpose of the legal proceeding, for the reasons given below, this disclosure was unreasonable, and thus it was unauthorized.

Disclosure for the purposes of a legal proceeding was unreasonable

[para 88] To begin the discussion of whether disclosure for a legal proceeding would be reasonable in the present case, I consider Order P2008-010. In that Order, the respondent organization was a law firm that maintained a database of information (including personal information) about Edmonton Police Officers. The Director of Adjudication found that collection, use, and disclosure of the information in the database was permitted under sections 14(d), 17(d), and 20(m) for existing legal proceedings and ones that were reasonably anticipated. She stated at paras. 64 to 65:

It is unquestionably the case, in my view, that if a legal proceeding has been initiated or a particular proceeding is reasonably anticipated, and the Organization or another law firm acting on behalf of a client requires information such as that in the database for the purpose of participating in the proceeding, for example, for helping a client to defend a charge, or for use as a starting point for further investigation for the purposes of such a defence, sections 14(d), 17(d) and 20(m) permit the collection, use and disclosure of relevant personal information where this is done at the time the charge had already been laid or was reasonably anticipated. (I take collection, use or disclosure of information that is useful in the sense of being relevant to an investigation or legal proceeding, insofar as each of these actions is reasonably required for the investigation or legal proceeding, to also be "reasonable for the purpose" within the terms of these provisions.)

With respect to disclosure, it is not, in my view, necessary that the disclosure contemplated in section 20(m) be done by or on behalf of the person defending a charge or instituting the proceeding; the disclosure can also be done by an organization to such a person. It would, therefore, permit such disclosure of information in the database by the Organization to another person or law firm who was contemplating or initiating the legal proceeding. I reach this conclusion on the basis that the Act contains no express limitation, in contrast to a similar provision in the FOIP Act which permits disclosures by public bodies for use in legal proceedings, but only proceedings to which the Government of Alberta or the public body who is doing the disclosing is a party. As well, I note that in Order H2004-005, already discussed above, a provision of the *Health Information Act* permitting disclosure

“for the purpose of a court proceeding” was held to permit disclosure by a custodian to a party in the proceeding where the custodian was herself not a party.

[para 89] The above passage makes clear that section 20(m) permits disclosure of personal information from an organization not immediately involved in a legal proceeding to another organization that is pursuing or is contemplating that it may pursue legal proceedings. I note that the Director of Adjudication took care to specify that she was also satisfied that under the circumstances in Order P2008-010, disclosure was reasonable for the purposes of a legal proceeding.

[para 90] My understanding then is that simply because one organization or person wants to collect information for the purposes of a legal proceeding, does not mean that it is automatically reasonable for the organization with the information to disclose it. For cases involving any form of that scenario, an organization must still satisfy the requirement that disclosure is reasonable for the purposes of a legal proceeding.

[para 91] PIPA sets out the standard of reasonableness in section 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 92] Under the present heading, I continue the distinction between the personal information as to the paternity of the child, and the Complainant’s genetic information.

Genetic Personal Information

[para 93] Even if I were to conclude under the present heading that disclosing other non-genetic personal information for the purposes of a legal proceeding is reasonable, I would not reach the same conclusion regarding the Complainant’s genetic personal information. I do not see that the Complainant’s genetic information was relevant for any legal determinations that had to be made. The Organization provides no evidence to this effect, and the Complainant, who was involved in the proceedings, asserts that the Report was not relevant to them. The Complainant’s genetic personal information falls outside of the terms of section 20(m) simply by virtue of the apparent irrelevance of such information to legal proceedings.

Personal Information other than genetic information

[para 94] As to personal information aside from genetic information, there are three reasons why I find that disclosure for a legal proceeding in this case would not meet the standard of reasonableness:

1. The Organization did not need to disclose the Complainant's personal information for the purposes of a legal proceeding in order to fulfill its functions
2. There is little, if any, nexus between the Organization and the legal proceedings
3. The Organization was not in a position to weigh the sensitivity of the information against the relevance and significance of the information to a "legal proceeding" purpose

[para 95] I discuss each of my reasons in turn below.

The Organization did not need to disclose the Complainant's personal information for the purposes of a legal proceeding in order to fulfill its functions

[para 96] Here, I am mindful of the purpose of PIPA, stated in section 3:

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 97] I draw particular attention to the fact that PIPA balances an individual's right to have their personal information protected against a need for an organization to disclose it. I find that the word "need" is instructive when interpreting the provisions in PIPA that permit disclosure, as I do here with respect to section 20(m). Disclosure of personal information may be found to be reasonable where the organization *needs* to disclose it in order to carry on its functions. In such a case, an individual's right to have their personal information protected may have to yield.

[para 98] In the present case, however, the regular operations of the Organization did not require it to disclose information for the purposes of a legal proceeding. Rather, it had standard practices for disclosing test results to its clients which did not have regard to the clients' purposes, and left it to them to determine to whom they wished to distribute the results.

[para 99] Similar considerations apply to disclosure to the lawyer, which, as already noted, was in excess of the Organization's regular practice. Even though the lawyer desired the results for the purpose of a legal proceeding, that desire did not impart to the Organization a new need to disclose information, or require it to consider the lawyer's position. The Organization's business is paternity testing. The purpose to which its clients and their lawyers intend to put the results of a test are irrelevant to its operations.

[para 100] As such, there was no reason for the Organization to consider its client's purposes, or the lawyer's, when disclosing information. Any consideration of their purposes, including disclosure per the Organization's legal disclosure policy, was gratuitous. Accordingly, any decision as to whether to disclose the information, depending on the particular purpose of the client or the lawyer was not reasonable.

There is little, if any, nexus between the Organization and the legal proceedings

[para 101] A review of cases considering whether an organization has authority under section 20(m) to disclose personal information reveals a common thread: where authority is found, there is a significant nexus between the organization and the legal proceedings in question.

[para 102] There are cases where an Organization that is itself party to a legal proceeding, and being thus at the heart of it, has authority under section 20(m) to disclose personal information for that purpose. See, for example, Orders P2015-04 and P2010-018.

[para 103] Similarly, there are cases where a lawyer acting for a party to a legal proceeding has authority under section 20(m). See, for example, Orders P2008-010 and P2017-08. In these cases, the lawyer is firmly connected to the proceeding.

[para 104] Other cases have found that those who work in service to a lawyer representing a party to a legal proceeding may disclose information under section 20(m). Order P2018-09 also involved an organization disclosing a complainant's personal information to a lawyer for the purposes of a legal proceeding, in which the organization was not a party. The organization was a private investigator retained by a law firm to gather information specifically for a legal proceeding, in which it was representing one of the parties. Though the investigator is not at the heart of the proceeding, a connection to the legal proceedings on the part of the organization is present. The organization was doing work on behalf of the law firm, directly involved in the proceeding.

[para 105] It is evident that section 20(m) permits disclosure by organizations with a significant connection to legal proceedings. In my view, the stronger the nexus between an organization and the legal proceeding, the more likely that disclosure for that purpose is reasonable.

[para 106] The Organization in this case is further removed from the legal proceedings than a party, a lawyer representing a party, or an investigator working on behalf of a lawyer. The Organization was not involved in legal proceedings between the Complainant and his former wife. Its role as the paternity testing service that the Complainant and his former wife happened to choose, is largely superfluous to the proceedings themselves. The Organization's only "connection" to the legal proceedings is that it became aware of them as a result of dealing with the Complainant and the lawyer. Simply being aware of the proceedings, however, did not significantly intertwine

the Organization in them. The legal proceedings remained the business of the parties to the paternity test, and the lawyer, and not that of Organization. As a result, there is an insufficient connection between the Organization and any legal proceedings, to make disclosure for that purpose reasonable.

The Organization was not in a position to weigh the sensitivity of the information against the relevance and significance of the information to a “legal proceeding” purpose

[para 107] As already discussed, the Complainant’s genetic information is very sensitive in its own right since it enables significant intrusions upon his right to privacy. In the context of legal proceedings, the result of the test indicating whether the Complainant is his daughter’s biological father is also particularly sensitive information. It was likely to have a significant impact on the legal proceedings and on the Complainant as a result, as well as on all the involved parties in general.

[para 108] In light of the sensitive nature of the information and the potential for serious ramifications if it was disclosed, it is not reasonable for an organization to disclose it lightly, or recklessly. An organization that was considering disclosing the information for the purposes of a legal proceeding would need to consider the consequences of disclosing it for such purposes.

[para 109] However, the Organization in this case was not in a position to make an assessment about these consequences (including whether under the circumstances disclosure might be adverse to the Complainant’s interests). It was far removed from the legal proceedings, and would not have substantial knowledge of them, or how the personal information in the Report might factor into them. Neither do I have any evidence to suggest that it tried to undertake such an assessment. Indeed, the Organization stated, “The undesirable outcome of [the Complainant’s] court proceeding is not our concern.”

[para 110] Since the Organization was unable to, and did not, take such relevant factors into account, it cannot be said that its decision to disclose the information for a legal proceeding was reasonable.

Conclusion on Section 20(m)

[para 111] As discussed, the Organization did not need to disclose the Complainant’s personal information for a legal proceeding in order to fulfill its functions. It did not have a strong connection to the legal proceedings, and it was not in a position to make a sound assessment of the consequences of disclosing the information for a legal proceeding. In view of these conclusions, I find that disclosure for the purposes of a legal proceeding, was not reasonable, and was not authorized by reference to section 20(m).

[para 112] To put the matter succinctly: without a need to disclose, nexus to the legal proceeding, or ability to weigh the consequences of disclosure, a reasonable person

would not consider it appropriate for the Organization to insert an individual's personal information into a legal proceeding without that individual's consent; even if that individual's circumstances suggested it would be used for that purpose, or because the opposing lawyer called and said she needed the information for that purpose.

[para 113] I add that, in my view, any organization faced with a request for personal information under such circumstances would do well to err on the side of caution in the face of uncertainty about whether disclosure is reasonable. Under section 59(1)(a), it is an offence to disclose personal information in contravention of Part 2 of PIPA. Part 2 houses sections 7, 8, and 20 discussed above. Further, under section 60, a cause of action may arise against an organization that has contravened PIPA. Even it were the case that disclosing personal information is reasonable under section 20(m), as noted earlier, authority to disclose information does not amount to a legal obligation to do so.

2. Did the Organization disclose the information contrary to, or in accordance with, section 19(1) of PIPA (disclosure for purposes that are reasonable)?

[para 114] Section 19(1) states as follows:

19(1) An organization may disclose personal information only for purposes that are reasonable.

[para 115] Since I have found that the Complainant is deemed to have consented to disclosing some personal information to his former wife, but not her lawyer, I discuss disclosure to each of them, separately.

Disclosure to the Complainant's former wife

[para 116] As discussed earlier, the Organization disclosed information to the Complainant's former wife for the purposes of providing paternity testing services. As throughout the rest of the Order, I discuss the Complainant's genetic information separately from the rest of his personal information.

Personal Information other than genetic information

[para 117] I find that it was reasonable for the Organization to disclose the Complainant's personal information for this purpose. This was the arrangement that was necessary for the Organization to carry out its functions. Disclosure of this information for this purpose, complies with section 19(1).

The Complainant's Genetic Personal Information

[para 118] With respect to the Complainant's genetic information, I have been given no reason as to why disclosing information of this nature to the former wife would be necessary to enable the Organization to carry out its functions. Nor has the Organization explained any other purpose for disclosing this specific information to the other party to

the testing. Therefore, I find disclosure of this information was not in accordance with section 19(1).

Disclosure to the lawyer

[para 119] With respect to disclosure of any of the information to the lawyer for the purposes of a legal proceeding, I note that earlier orders of this office have held that a legal proceeding is, generally, a reasonable purpose (See, for example, Order P2017-05 at paras 37 and 38 and Order P2020-03 at paras 158 and 159). However, for the reasons already discussed (the absence of necessity for performing the Organization's functions, the lack of its connection to the legal proceedings, and its inability to assess the significance of disclosure to the legal proceedings), disclosure *by the Organization* for this purpose was not a disclosure for a reasonable purpose.

[para 120] To the extent that the Organization disclosed personal information to the lawyer in order to fulfill a legal obligation, since the legal obligation did not exist, this was not a reasonable purpose for disclosure.

[para 121] Accordingly, I find that the Organization did not have a reasonable purpose for disclosing any of the information to the lawyer, and did not disclose information to her in accordance with section 19(1).

3. Did the Organization disclose the information contrary to, or in accordance with, section 19(2) of PIPA (disclosure to the extent reasonable for meeting the purposes)?

[para 122] Section 19(2) states as follows:

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

[para 123] As discussed earlier, it was not reasonable for the Organization to disclose the Complainant's genetic information for the purposes of providing paternity testing services. Accordingly, I find that the Organization disclosed information beyond a reasonable extent when it disclosed that information to her.

[para 124] Disclosing the Complainant's non-genetic personal information was part of the regular process of paternity testing. Therefore, I find that disclosure of this information to the Complainant's former wife is to a reasonable extent.

[para 125] As the Organization had no reasonable purpose for disclosing any of the information to the lawyer, I find that when it did so, it did not disclose information in accordance with section 19(2).

IV. ORDER

[para 126] I make this Order under section 52 of PIPA.

[para 127] I order the Organization to cease disclosing personal information in contravention of PIPA.

[para 128] I order the Organization to provide to the Complainant and to me, written confirmation that it has complied with this order within 50 days of receiving it.

John Gabriele
Adjudicator