Order P20-03

# MARY- HELEN WRIGHT LAW CORPORATION carrying on business as PACIFIC LAW GROUP and BOUGHTON LAW CORPORATION

Elizabeth Barker
Director of Adjudication

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**Summary:** A party in proceedings before the British Columbia Human Rights Tribunal complained that the opposing party's lawyer disclosed her personal information contrary to s. 6 of the *Personal Information Protection Act*. The adjudicator found that the Act had not been contravened.

**Statutes Considered:** *Personal Information Protection Act*, ss. 1 (definition of "contact information", "personal information", "proceeding" and "work product information"), 2, 3(2)(h), 3(3), 3(4), 6, 7(1), 8(1), 8(3), 10(1), 10(3), 17 and 18(1)(o). *Freedom of Information and Protection of Privacy Act*, s. 3(1)(h) and Schedule 1 (definition of "prosecution"). *Human Rights Code*, ss. 27.3 and 48. *Interpretation Act*, s. 1.

## INTRODUCTION

[1] The complainant in this case is a former employee of Mary-Helen Wright Law Corporation, carrying on business as Pacific Law Group (PLG). The complainant filed a human rights complaint against PLG with the British Columbia Human Rights Tribunal (Tribunal). PLG retained Boughton Law Corporation (Boughton) to defend PLG in the human rights matter.

[2] The complainant complained to the Office of the Information and Privacy Commissioner (OIPC) that during the Tribunal proceedings, Boughton disclosed the complainant's personal information contrary to s. 6(1)(c) of the *Personal Information Protection Act* (PIPA).[1] Section 6(1)(c) states that an organization

[1] Complainant's June 16, 2017 complaint at p. 4.

must not disclose personal information about an individual. The complainant alleged that both PLG and Boughton (the respondents) contravened s. 6(1)(c).

[3] The OIPC did not attempt to mediate this case. The OIPC investigator informed the parties that, given the complexity of the case, he was sending it directly to inquiry.[2]

[4] This inquiry was originally assigned to a different adjudicator to decide. She sought further submissions from the parties on a number of issues. However, she did not decide the case before she moved on to other employment. The inquiry was subsequently reassigned to me for adjudication. The parties each provided multiple submissions. I have considered all of the materials the parties provided, including the further submissions they sent in response to the questions posed by the former adjudicator.

***Preliminary matters***

[5] PIPA governs the collection, use and disclosure of personal information by organizations. The respondents do not dispute that they are each "an organization" as defined by s. 1 of PIPA.[3] They also do not dispute that what occurred was a disclosure of the complainant's personal information.

[6] Section 1 of PIPA defines personal information as follows:

> "personal information" means information about an identifiable individual and includes employee personal information but does not include
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> (a) contact information, or
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> (b) work product information;
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> "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;
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> "work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information.

[2] It appears that this was done with the consent of the parties. In addition, there was no OIPC Investigator's Fact Report produced.
[3] Respondents' October 9, 2018 submission at p. 4.

[7] I find that the information at issue, which will be described in more detail below, is the complainant's personal information.[4] It is about the complainant and it is clearly not "contact information" or "work product information."

[8] Further, I find that what took place, which will also be described below, was a "disclosure" of the complainant's personal information.

## ISSUE

[9] The main issue in this case is whether PLG and/or Boughton disclosed the complainant's personal information contrary to PIPA. The respondents also raise a jurisdictional issue as to whether PIPA applies to the disclosure of the complainant's personal information. Specifically, they raise ss. 3(2)(h), 3(3) and 3(4) of PIPA.

## DISCUSSION

### *Background*

[10] The complainant was working as a lawyer for PLG when she was injured in a motor vehicle accident. Approximately six weeks after the accident, PLG terminated her employment.[5] In December 2015, the complainant filed a complaint with the Tribunal alleging PLG terminated her employment on the basis of a physical disability contrary to the *Human Rights Code* (Code).[6] PLG retained Boughton to represent it in the Tribunal proceedings.

[11] The crux of this PIPA complaint is an event that took place during the Tribunal proceedings. Boughton, on behalf of PLG, brought a multi-part application for various orders (the Application). The Application was a 55-page, seven-part application with 61 pages of appendices. The part of the Application that is significant in this case sought an order for disclosure of records held by non-parties to the proceedings.[7] Boughton served the entire Application on the non-parties from whom it hoped to acquire documents related to the issues raised in the Tribunal proceedings. The non-parties were the complainant's past and current employer, a legal recruiter and 13 physicians. The Application contained details about the complainant's human rights complaint, the remedies

[4] There is also some personal information about other people but there is no complaint/issue here about how the respondents dealt with that personal information.
[5] Record of Proceedings, at Tab 1, in PLG's judicial review of *Jenkins v. Pacific Law Group and another*, 2017 BCHRT 116. The petition was dismissed as premature in *Mary-Helen Wright Law Corporation v British Columbia (Human Rights Tribunal)*, 2018 BCSC 912.
[6] [RSBC 1996] c. 210. Record of Proceedings, *ibid*, at Tab 2. The complainant also commenced proceedings in the BC Supreme Court for wrongful dismissal.
[7] The other parts of the Application were for dismissal, deferment and adjournment of the human rights complaint, examinations for discovery and an independent medical examination.

she was seeking, her medical care, education, employment, a BC Law Society matter and her emails with witnesses.[8]

[12] The parties' submissions focus in large part on the Tribunal's *Rules of Practice and Procedure* (Rules) that govern disclosure during Tribunal proceedings, so it is necessary to describe them here at the outset. Section 27.3 of the Code confers power on the Tribunal to make rules respecting practice and procedure, including disclosure of evidence. Rule 4 says that the parties must comply with the Tribunal's Rules, orders, decisions and directions and the Tribunal can enforce non-compliance, including ordering costs under s. 37(4) of the Code.

[13] Rule 20 obliges the parties to disclose to each other all documents relevant to the complaint and response. Rule 20.2 states that disclosure is an on-going obligation and it provides a process by which a party can apply for an order limiting the scope of disclosure. However, the Rule that is most relevant in this inquiry is Rule 23, and in particular 23(2). Rule 23 states:

> Rule 23 – Application for Document Disclosure
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> Application for disclosure
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> (1) An application for an order that a person deliver a copy of a document must state:
>
> (a) how disclosure of the document requested will further the just and timely resolution of the complaint;
> (b) how the document requested may be relevant to an issue in the complaint, response to the complaint, or remedy sought; and
> (c) the participant's efforts to obtain a copy of the document.
>
> Application for disclosure from a non-party
>
> (2) In addition to complying with rule 23(1), a participant applying for an order that a person who is not a party deliver a copy of a document in that person's possession or control must:
>
> (a) state in the application that they seek an order under section 34(3)(b) of the *Administrative Tribunals Act*;[9]
> (b) provide the person with a copy of the application and advise the person that they may contact the tribunal to request a copy of the complaint, response to the complaint, or details of the remedy sought; and

[8] Record of the Proceedings, *supra* at note 5 at Tab 16 (Application).
[9] Section 34(3)(b) of the *Administrative Tribunals Act* says that with the exception of documents about settlement, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

> (c) notify the tribunal in writing of the date, method, and address at which the person was provided a copy of the application.

[14] By September 2016, the complainant and PLG had disclosed information to each other in the course of the Tribunal proceedings. PLG also sought, from the complainant, disclosure of documents that were in the possession of the non-parties. The complainant provided the respondents with some of the requested non-party documents, but she did not agree to everything the respondents were seeking.[10]

[15] On January 24, 2017, Boughton filed the Application with the Tribunal. Some parts of the Application were decided but others remained outstanding, including the issue related to non-party document disclosure. At a February 2, 2017 prehearing conference, the Tribunal gave direction on next steps regarding that issue.[11] Accordingly, the complainant provided a submission and PLG had until March 10, 2017 to reply.[12]

[16] On March 2, 2017, the event occurred that the complainant says contravened PIPA.[13] Specifically, Boughton sent the Application to the non-parties with a cover letter that said:

> We are the lawyers for the Respondents…
>
> We are in the process of taking steps to obtain documents in relation to the issues raised in these proceedings. At the present time, an application is pending before the Tribunal seeking production of those documents from a number of sources, including yourself.
>
> The documents or groups of documents we are seeking from you are …
>
> Pursuant to Rule 23(2) of the *Rules of Practice and Procedure* (B.C.H.R.T.), a participant, here PLG, may apply for an order that a person who is not a party to the proceedings before the Tribunal deliver a copy of a document in that person's possession or control. The participant, here PLG, must "…provide the person with a copy of the application and advise the person that they may contact the tribunal to request a copy of the complaint, response to the complaint, or details of the remedies sought….".
>
> And by this letter to you, we are doing so and in that regard, we are attaching a copy of the Application dated January 24, 2017.
> …

[10] Record of Proceeding *supra* at note 5 at Tab 1 (paras. 38-44) and Tabs 10-16.
[11] Record of the Proceedings, Tabs 24-27 and Tab 77 at para. 92.
[12] *Jenkins v. Pacific Law Group and another (No. 5),* 2019 BCHRT 169 [*Jenkins No. 5*] at para. 26.
[13] Complainant's June 16, 2017 complaint at p. 4.

> In the result, we seek your advice as to whether, first, you have any objections to delivering copies of these documents to us for use in the proceedings and if so, what those objections are.
>
> The Tribunal has directed that further response materials be delivered to the Tribunal on or before March 10, 2017, and accordingly may we hear from you on this aspect of this matter by March 9, 2017.[14]

[17] When the complainant learned of this, she complained to the Tribunal that the respondents had not followed the Tribunal's directions.[15] In response, the Tribunal member with conduct of the case held a case conference, and subsequently wrote to the non-parties to say:

> On March 2, 2017, [Boughton], acting on behalf of the respondents in the above complaint, forwarded to you a letter advising that he may be seeking documents in your possession that relate to the dispute. He said that he was seeking certain documents and said that he was obliged to: "provide the person with a copy of the application and advise the person that they may contact the tribunal to request a copy of the complaint, response to the complaint, or details of the remedies sought ..." I understand that he has since provided you with the complainant's response to his application.
>
> Having discussed this matter with the parties to the complaint, I am requesting that you destroy the letter of March 2, 2017 and the enclosed documents. The letter included applications that had been denied and documents that contain sensitive personal information of [the complainant] not related to the application for disclosure of documents.
>
> …If I determine that there exists a basis to order disclosure of the documents sought, then you will be provided with notice and an opportunity to make submissions on whether the Tribunal should order you to produce the documents…[16]

[18] On May 25, 2017, the Tribunal member decided the outstanding matters in the Application including those regarding non-party document disclosure. She ruled that if, after a request from the complainant, the non-parties refused to provide potentially relevant documents, PLG could ask the Tribunal member for further direction.[17]

[19] In June 2017, the complainant formally filed a retaliation complaint with the Tribunal. She alleged that Boughton, on behalf of PLG, had retaliated against her contrary to s. 43 of the Code when it disclosed the entire Application to the

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[14] Record of Proceedings *supra* at note 5 at Tab 31.
[15] Record of Proceeding *supra* at note 5 at Tab 47 (Complainant's March 7, 2017 letter).
[16] Record of Proceedings, *supra* at note 5 at Tab 60 (Complainant's submission, schedule G).
[17] *Jenkins v. Pacific Law Group and another*, 2017 BCHRT 116, at para.134. Ultimately, PLG never pursued its application for non-party documents.

non-parties. Section 43 states, in part, that a person must not intimidate, coerce or otherwise discriminate against a person that submits a complaint under the Code. The complainant said that when the respondents sent the whole seven-part Application to each of the non-parties, they disclosed information that was associated with matters that had already been dismissed as well as sensitive and personal information that was irrelevant to the scope of the documents sought from that particular non-party.[18] The complainant alleged that the respondents did this to retaliate against her for making a discrimination complaint against PLG.[19]

[20] Also, in June 2017, the complainant made this PIPA complaint about the same event.

[21] In August 2019, the Tribunal dismissed the complainant's discrimination complaint after finding she had not proven that she had a disability or that PLG perceived her to have a disability when it terminated her employment.[20]

[22] In a separate concurrent decision, the Tribunal also dismissed the complainant's s. 43 retaliation complaint. The Tribunal member deciding the matter thoroughly discussed what had occurred with regards to the Application, the Tribunal Rules and the parties' submissions and evidence. She said that the format of the Application (i.e., framing of the seven applications in one) appears to have been due to Boughton's unfamiliarity or disregard of the Rules and not for the purpose of retaliation. She found that Boughton's behaviour "was consistent with that of a senior litigator in the Courts," and it had "engaged in a vigorous defence of the complaint and was acting under principles known to apply in Court litigation."[21] She concluded Boughton had "interpreted the parties' obligations through that lens and tried to mould the Tribunal's procedures to accord with that with which he was more familiar."[22]

[23] The Tribunal member said:

> Having regard to its impact of [sic] the integrity of the Tribunal's process, it was improper. The Respondents [sic] In the Respondents' zeal to defend the complaint, they drew in many others to the proceedings. They were not meticulous in advancing their claims for documents and [the complainant's] personal information was distributed without seeming regard to her privacy.[23]

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[18] *Jenkins No. 5, supra* note 12 at para. 95.
[19] *Jenkins No. 5, supra* note 12 at paras. 2 and 55.
[20] *Jenkins v. Pacific Law Group and another (No. 4)*, 2019 BCHRT 168.
[21] *Jenkins No. 5, supra* note 12 at paras. 78 and 79.
[22] *Jenkins No. 5, supra* note 12 at para. 81.
[23] *Jenkins No. 5, supra* note 12 at para. 121.

[24] The Tribunal member concluded that Boughton's conduct was deserving of sanction and she awarded the complainant $5,000 in costs.

[25] I wrote to the complainant to ask if, in light of the Tribunal's s. 43 retaliation decision and costs award, she still wished to pursue this PIPA complaint. She confirmed that she wanted to proceed.[24]

### *Application of PIPA*

[26] Section 3(1) says that PIPA applies to every organization, and there is no dispute that the respondents qualify as organizations, so in that regard PIPA applies to them. However, the respondents argue that PIPA has no jurisdiction over the collection, use or disclosure of personal information in the course of Tribunal proceedings because ss. 3(2)(h), 3(3) and 3(4) apply. I will consider this issue at the outset because if the respondents are correct, it is a complete answer to this complaint.

*Section 3(2)(h) – document related to a prosecution*

[27] Section 3(2)(h) says that PIPA does not apply to "a document related to a prosecution if all proceedings related to the prosecution have not been completed." The respondents submit that s. 3(2)(h) is engaged in this case because the Application relates to the complainant's prosecution of her human rights complaint and all proceedings related to it have not been completed.[25] The complainant disputes that the Tribunal proceeding is a "prosecution" and says that s. 3(2)(h) has no application to a complaint or proceedings under the Code.[26]

[28] Section 1 of PIPA defines "proceeding" as follows:

> "proceeding" means a civil, a criminal or an administrative proceeding that is related to the allegation of
>
> > (a) a breach of an agreement,
> > (b) a contravention of an enactment of Canada or a province, or
> > (c) a wrong or a breach of a duty for which a remedy is claimed under an enactment, under the common law or in equity;

[29] A complaint before the Tribunal clearly meets the definition of "proceeding" under PIPA. It is a civil or administrative proceeding related to an allegation of a contravention of a provincial enactment, specifically the Code.

[30] PIPA does not define the term "prosecution" and it has not been interpreted in any previous PIPA orders. There is also no definition in the

[24] Complainant's January 31, 2020 letter.
[25] Respondent's October 9, 2018 submission at p. 4.
[26] Complainant's November 15, 2018 submission at p. 2.

*Interpretation Act*.[27] However, there is a definition in the *Freedom of Information and Protection of Privacy Act* (FIPPA). Section 3(1)(h) of FIPPA is nearly identical to s. 3(2)(h) of PIPA and it says that FIPPA does not apply to "a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed."

[31] FIPPA defines "prosecution" as "the prosecution of an offence under an enactment of British Columbia or Canada."[28] FIPPA orders have consistently said that "prosecution" in s. 3(1)(h) means the "prosecution of a criminal or quasi-criminal offence."[29] They have also said that the purpose of s. 3(1)(h) in FIPPA is to allow prosecutions to proceed without interference by insulating Crown counsel from FIPPA access requests until such time as the prosecution is complete.[30]

[32] Statutory interpretation requires that statutes dealing with the same subject matter be interpreted in harmony, such that equivalent terms should be given equivalent meanings unless contrary definitions exist.[31] I note the similarity of legislative purpose and the content between PIPA and FIPPA. Both Acts contain provisions that regulate the collection, use and disclosure of personal information. While PIPA's provisions apply to organizations, FIPPA's apply to public bodies. Further, both PIPA and FIPPA contain many parallel provisions that limit what types of records fall outside the scope of each Act. In my view, the principle that statutes covering the same subject matter should be interpreted harmoniously governs; thus, it is appropriate to be guided by FIPPA's definition of "prosecution" and the interpretation of that term in FIPPA orders dealing with s. 3(1)(h).

[33] I find that the definition of "prosecution" in FIPPA and how FIPPA orders and decisions have interpreted the term in the context of s. 3(1)(h) applies equally to s. 3(2)(h) of PIPA. Thus, a "prosecution" means "a prosecution of an offence under an enactment of British Columbia or Canada," and s. 3(2)(h) of PIPA applies to prosecutions of criminal or quasi-criminal offences.[32] For clarity, I would add that a common thread between criminal and quasi-criminal offences is that it is the state that has the responsibility for prosecution.

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[27] *Interpretation Act* [RSBC 1996] c. 238
[28] FIPPA, Schedule 1.
[29] Order No. 290-1999 1999 CanLII 2352 (BC IPC); Order No. 03-28, 2003 CanLII 49207 (BC IPC); Order F05-03, 2005 CanLII 4174 (BC IPC);Order F17-30, 2017 BCIPC 32 (CanLII).
[30] Order F17-30, 2017 BCIPC 32 at para. 11;Order No. 20-1994, 1994 CanLII 606 (BC IPC); Order No 256-1998, 1998 CanLII 2682 (BCIPC).
[31] *United Food & Commercial Workers Union, Local 1518 v Sunrise Poultry Processors Ltd.*, 2015 BCCA 354 at para. 81; Sullivan R, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc, 2014) at p. 417 at 13.26 and p. 418, s. 13.28.
[32] Quasi criminal offences are non-criminal wrongs against society that are prohibited by federal and provincial statutes. In some contexts, quasi-criminal offences are referred to as "regulatory" offences.

[34] There are other provisions in PIPA that provide support for this interpretation of "prosecution." For instance, the term prosecution in s. 18(1)(j) of PIPA only has meaning in the context of the state pursuing legal action for a criminal or quasi-criminal offence. Section 18(1)(j) says:

> 18 (1) An organization may only disclose personal information about an individual without the consent of the individual, if
>
> > (j) the disclosure is to a public body or a law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation, or in the making of a decision to undertake an investigation,
> >
> > > (i) to determine whether the offence has taken place, or
> > > (ii) to prepare for the laying of a charge or the prosecution of the offence,

[35] The other places where the term "prosecution" appears in PIPA are ss. 39(1), 41(5) and 56(3). In those sections, it is also used in the context of the state commencing and carrying-out legal action related to criminal or quasi-criminal offences, i.e., "prosecution for perjury" or "prosecution for an offence under this Act."

[36] A human rights complaint is not a criminal or quasi-criminal offence and the state does not initiate or pursue such complaints. They are a civil law matter, initiated and pursued by a private complainant. Therefore, I find that the complainant's human rights complaint is not a "prosecution" under s. 3(2)(h) of PIPA. In conclusion, the respondents' have not established that PIPA does not apply because s. 3(2)(h) applies.

> *Sections 3(3) (solicitor client privilege) and 3(4) (information available by law to a party to a proceeding)*

[37] The respondents submit that ss. 3(3) and 3(4) demonstrate that the Legislature did not intend for PIPA to interfere with how information is collected, used and disclosed during the course of proceedings (as defined by PIPA).[33]

[38] Sections 3(3) and (4) state:

> 3 (3) Nothing in this Act affects solicitor-client privilege.
>
> (4) This Act does not limit the information available by law to a party to a proceeding.

[33] Respondents' October 9, 2018 submission at p. 5.

[39] The respondents submit that once proceedings are commenced before an adjudicative authority, the provisions of PIPA cease to apply. So long as those proceedings are underway, the collection, use and disclosure of documents (and information in those documents) are governed, the respondents say, by the rules and procedures of the adjudicating authority and the general law.[34] The respondents submit:

> In the result, if [the complainant's] position is upheld by the Commissioner, no party to a legal proceeding (whether before a court or a tribunal), with personal information of one or more of the other parties that is germane to the matters at issue, will be able (absent the consent of the party possessing the personal information) to use (or obtain further) that personal information for the purposes of the proceedings, including interviewing actual and potential witnesses, obtaining other information, documents and evidence from third parties or taking whatever steps it can (within the scope of the proceedings) to present its case. Nothing of that nature was ever intended by anything in the *Personal Information Protection Act* (B.C.).[35]

[40] The respondents also say:

> The purpose of the legislation was "not to modify or abrogate the laws in relation to solicitor/client (and perhaps litigation) privilege, the right of a party to a proceeding to present a full and complete defence in accordance with the rules of natural justice or to dictate to adjudicative authorities (be they the Tribunal, the Court or any other adjudicative body) what evidence is to be collected by the parties (and how) and in turn, what evidence is (and is not) to be adduced before the adjudicative authority.[36]

[41] The complainant submits that s. 3(4) does not authorize the respondents to disclose her personal information to individuals who were not parties to the proceedings. She says that s. 3(4) only means a party cannot rely on PIPA to refuse to disclose records available to a party to a proceeding. The complainant does not discuss s. 3(3).

*Analysis*

[42] For the reasons that follow, I find that ss. 3(3) and 3(4) are intended to provide clarity and guide the interpretation and application of PIPA but they do not, in and of themselves, authorize or prohibit the collection, use or disclosure of personal information.

[43] Section 3(4) says that PIPA does not limit the information "available by law to party to a proceeding." There have been no previous PIPA orders interpreting that phrase in s. 3(4). However, s. 3(2) of FIPPA contains the identical provision.

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[34] Respondents' October 9, 2018 submission at p. 5.
[35] Respondents' March 9, 2018 submission at para. 137.
[36] Respondent's October 8, 2018 submission at p. 9.

Therefore, it is of assistance to consider how this language has been interpreted in FIPPA orders. Several FIPPA orders have explained that s. 3(2) of FIPPA does not mean that records that are "available by law to a party to a proceeding" are excluded from the operation of FIPPA, nor does it create additional rights to records.[37] Rather, the language of s. 3(2) "provides reassurance that FIPPA does not restrict the availability of information to a party to a proceeding, where that information is available by law."[38]

[44] In my opinion, the meaning and purpose of s. 3(4) in PIPA is the same. Section 3(4) does not confer any substantive right or authority to collect, use or disclose personal information other than as expressly set out in the rest of PIPA. Rather, it ensures that the restrictions in PIPA are not interpreted so as to prevent a party to a proceeding from accessing information they are entitled to access in the course of a proceeding. The language of s. 3(4) merely provides reassurance that PIPA does not restrict the availability of information to a party to a proceeding where that information is available by law. Put another way, this provision ensures that PIPA does not interfere with, or override, statutory or common law processes or rules that make information available to a party to a proceeding.[39]

[45] I conclude that s. 3(3) similarly functions as an interpretive guide. Its purpose is to ensure that none of PIPA's provisions impinge on, or diminish, solicitor client privilege.

[46] In conclusion, I am not persuaded by the respondents' argument that PIPA has no jurisdiction over the collection, use or disclosure of personal information in the course of Tribunal proceedings because ss. 3(3) and 3(4) apply.

### *Consent*

[47] The default position under PIPA is that organizations are not permitted to collect, use or disclose personal information unless certain conditions related to consent are met. The following provisions are relevant to the issue of consent in this case:[40]

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[37] Order F10-17, 2010 BCIPC 26 at para. 11; Order F13-27, 2013 BCIPC 36 at para. 12; Order F14-12, 2014 BCIPC 15 at para. 27.
[38] Order F10-17, 2010 BCIPC 26 at para. 11.
[39] This is how the equivalent provision in Alberta's *Personal Information Protection Act*, s. 4(5)(b), has been interpreted: *Peter Choate & Associates Ltd v Dahlseide*, 2014 ABQB 117, at paras. 45–46.
[40] There are other provisions in PIPA related to consent, which are not relevant for the purpose of this inquiry: ss. 12, 13, 15, 16, 18, 19, 21 and 22 permit collection, use and disclosure without consent in certain circumstances.

Consent required

6 (1) An organization must not

(a) collect personal information about an individual,

(b) use personal information about an individual, or

(c) disclose personal information about an individual.

(2) Subsection (1) does not apply if

(a) the individual gives consent to the collection, use or disclosure,

(b) this Act authorizes the collection, use or disclosure without the consent of the individual, or

(c) this Act deems the collection, use or disclosure to be consented to by the individual.

Provision of consent

7 (1) An individual has not given consent under this Act to an organization unless

(a) the organization has provided the individual with the information required under section 10 (1), and

(b) the individual's consent is provided in accordance with this Act.

(2) An organization must not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information beyond what is necessary to provide the product or service.[41]

Implicit consent

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

(a) at the time the consent is deemed to be given, the purpose would be considered to be obvious to a reasonable person, and

(b) the individual voluntarily provides the personal information to the organization for that purpose.

...

(3) An organization may collect, use or disclose personal information about an individual for specified purposes if

[41] Section 7(3) is about attempting to obtain consent by providing false or misleading information or using deceptive or misleading practices. Section 7(3) does not apply here as there is no allegation of that nature in this case.

> (a) the organization provides the individual with a notice, in a form the individual can reasonably be considered to understand, that it intends to collect, use or disclose the individual's personal information for those purposes,
>
> (b) the organization gives the individual a reasonable opportunity to decline within a reasonable time to have his or her personal information collected, used or disclosed for those purposes,
>
> (c) the individual does not decline, within the time allowed under paragraph (b), the proposed collection, use or disclosure, and
>
> (d) the collection, use or disclosure of personal information is reasonable having regard to the sensitivity of the personal information in the circumstances.
>
> (4) Subsection (1) does not authorize an organization to collect, use or disclose personal information for a different purpose than the purpose to which that subsection applies.
>
> Required notification for collection of personal information
>
> 10 (1) On or before collecting personal information about an individual from the individual, an organization must disclose to the individual verbally or in writing
>
> (a) the purposes for the collection of the information, and
>
> (b) on request by the individual, the position name or title and the contact information for an officer or employee of the organization who is able to answer the individual's questions about the collection.
>
> ...
>
> (3) This section does not apply to a collection described in section 8 (1) or (2).

*Parties' submissions*

[48] The complainant alleges that the respondents contravened s. 6(1)(c) by disclosing her personal information without her consent. She says this occurred when the respondents gave their Application to the non-parties.

[49] The respondents submit that s. 6(2)(c) applies and the complainant gave deemed consent under s. 8(1) when she voluntarily commenced the Tribunal proceedings. The respondents say that she commenced the proceedings knowing that the Tribunal Rules obliged her to produce personal information germane to the matters at issue and that the Rules provided for the respondents'

use and disclosure of that information.[42] The respondents say that the "overarching purpose of the Application (those that included …personal information) was to obtain further information and evidence about the matters raised by [the complainant] herself in the Tribunal Complaint in order to present a full and complete defence."[43]

[50] The respondents argue that it would be contrary to the rules of natural justice to give a party a "veto" over what the opposing party can do with the personal information that is germane to the issues to be adjudicated, including interviewing witnesses and collecting further information and evidence for use in legal proceedings.[44] The respondents say:

> At this stage, it is important to note the role of a party/recipient to a proceeding and its counsel, whether those proceedings are before the Tribunal, the Court or some other adjudicative authority. That party/recipient (along with its counsel) has an absolute and unfettered right to conduct such investigations as it may deem necessary or advisable to collect evidence and to investigate the matter all with the object of presenting his, her or its own best case before the adjudicating authority in accordance with the rules and procedures of the adjudicating authority.
>
> If, as [the complainant] appears to be suggesting, PLG could only do so with her consent then virtually by definition the proceedings before the Tribunal and the Court (and before any other adjudicative authority) would be inevitably compromised because, for obvious reasons, [the complainant] would not give such consent. No properly-advised party to a proceeding would **ever** consent to the other party undertaking an investigatory process the object of which, of course, would be to undermine the claim/defence of the original party.[45]

[51] The respondents submit that by commencing the Tribunal proceeding, the complainant consented to any collection, use and disclosure of her personal information as contemplated by the *Rules*.[46] They say that the complainant put her medical and employment history in issue and so she implicitly waived her right to privacy and confidentiality over that information and that right was replaced by the common law implied undertaking of confidentiality and Rule 23.1(2).[47]

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[42] Respondents' October 9, 2018 submission at p. 7-8.
[43] Respondent's March 9, 2018 submission at para. 44.
[44] Respondents' March 9, 2018 submission at para. 16. Respondents' October 9, 2018 submission at pp. 6 and 20.
[45] Respondents' October 9, 2018 submission at p. 12.
[46] Respondents' November 14, 2017 submission at paras. 72-86.
[47] Respondents' November 14, 2017 submission at paras 86 and Respondents' March 9, 2018 submission at para. 68.

[52] The respondents cite *Duncan v. Lessing*, 2018 BCCA 9 [*Duncan*] where the BC Court of Appeal explains the implied undertaking of confidentiality principle as follows:

> The operative principle is that the public interest in getting at the truth outweighs the parties' privacy interests, but that these interests are entitled to such protection as can be afforded them without interfering with the efficient conduct of civil litigation. This principle has led to two common law rules.
>
> The first is that parties to litigation and their counsel are under an implied undertaking not to use private information obtained through pre-trial procedures in a lawsuit for any purpose other than in relation to that lawsuit. This rule provides a measure of protection for parties' privacy interests. Parties are free to use information obtained in the lawsuit for the purposes of the lawsuit and the implied undertaking of confidentiality is extinguished when the evidence is used in open court.
>
> The second rule is that an absolute privilege attaches to any statements made in the course of civil litigation. This rule is located in the law of defamation and is intended to ensure that the participants in a lawsuit, including counsel, are not impeded in making such statements or other communications as they consider appropriate given their role in the proceedings.
>
> These rules complement one another in ensuring that the public interest in securing justice is maintained while providing such protection for privacy interests as is consistent with this objective.[48]

[53] The respondents also cite Tribunal's Rule 23.1, which says as follows:

> Rule 23.1 – Confidentiality of Disclosed Documents
>
> (1) Documents that a participant obtains though the disclosure process in Part 6 of these Rules are confidential.
>
> (2) A participant must not use a document obtained through the disclosure process in Part 6 of these Rules for any purpose other than the complaint process in which they were disclosed, except:
>
> (a) with the consent of the party who disclosed the document;
> (b) by order of the Tribunal;
> (c) after the document is entered as evidence in a hearing.

[54] The complainant does not directly address the issue of s. 8(1)(b) and whether she voluntarily provided the personal information. However, she denies

[48] *Duncan v. Lessing*, 2018 BCCA 9 [Duncan] at paras. 4-7. The Court of Appeal follows the law in the leading case on the implied undertaking rule: *Juman v. Doucette*, 2008 SCC 8.

the respondent's suggestion that she waived her right to privacy over her personal information or that the respondents had her implied consent to disclose her personal information to the non-parties.[49]

*Analysis*

[55] For the reasons that follow, I find that this is a case of deemed consent and ss. 6(2)(c) and 8(1) apply. Section 6(2)(c) allows an organization to collect, use and disclose personal information about an individual where the Act deems the collection, use or disclosure to be consented to by the individual. Section 8(1) sets out the conditions for a finding of deemed consent. Section 8(1) states that an individual is deemed to consent to the collection, use or disclosure of personal information by an organization for a purpose if at the time the consent is deemed to be given, the purpose would be considered obvious to a reasonable person, and the individual voluntarily provides the personal information to the organization for that purpose.

[56] I conclude that the complainant provided the personal information in her human rights complaint and related supporting documents to the respondents and that she did so for the purpose of the Tribunal proceedings and for the Tribunal to govern that information accordingly. She initiated the human rights complaint and would have understood (particularly as she is a lawyer) that by doing so she would need to disclose personal information to prove that she was fired due to a disability and to give PLG fair notice of the case it must meet. I find that at the time she provided the personal information it would have been obvious to a reasonable person that the respondents would collect, use and disclose that information for the purposes of the Tribunal proceedings, specifically to understand the issues and gather information in PLG's defence.

[57] Further, I find that the complainant voluntarily provided the personal information for the respondents' use in the Tribunal proceedings. The applicant did not say that she was compelled to initiate and/or participate in the human rights complaint. I conclude she chose to do so and voluntarily subjected herself to the Rules and, thus, voluntarily provided her personal information for the purpose of the Tribunal proceedings.

[58] The complainant says that even if the respondents did have her implied consent (which she denies), they were still required to disclose her personal information reasonably with regards to its sensitivity. By failing to do that, she says that they did not comply with s. 8(3)(d).[50] Section 8(3)(d) states that an organization may collect, use or disclose personal information about an individual for specified purposes if the collection, use or disclosure of personal information

[49] Complainant's January 30, 2018 submission.
[50] Complainant's January 30, 2018 submission at p. 8.

is reasonable having regard to the sensitivity of the personal information in the circumstances.

[59] Section 8(3), however, only applies in the situation where the purpose for the collection, use and disclosure needs to be "specified" because the purpose is not obvious, as it is when s. 8(1) applies. When the purpose for the collection, use or disclosure is not obvious, s. 8(3) is engaged and requires the organization take steps to ensure it has the individual's consent. The organization must provide the individual with a notice under s. 8(3)(a) that specifies what the purpose is, and it must also comply with the other requirements in s. 8(3)(b) – (d). Having found in this case that the purpose for the collection, use and disclosure is obvious to a reasonable person, I conclude that s. 8(1) applies and s. 8(3) does not.

[60] In summary, I find that ss 6(2)(c) and s. 8(1) apply and the complainant is deemed to have consented to the respondents' collection, use and disclosure of her personal information for the purposes of the Tribunal proceedings. For that reason, the notification requirements in ss. 7(1), 8(3) and 10(1) do not apply.

***Disclosure without consent, s. 18***

[61] Although I find that this is a case of deemed consent, for completeness, I have also considered whether disclosure without consent was authorized under s. 18 of PIPA. Section 18 sets out the situations in which an organization may disclose personal information about an individual without the consent of the individual. The respondents submit that ss. 18(1)(c), (m) and (o) authorized disclosure without the complainant's consent. The complainant disputes that PIPA authorized disclosure without consent. The parties only made submissions about s. 18(1)(o), so I will begin with that provision.

[62] Section 18(1)(o) states that an organization may only disclose personal information about an individual without the consent of the individual, if the "disclosure is required or authorized by law."

[63] The respondents submit that disclosure of the personal information in the Application was authorized by law, specifically by the implied undertaking of confidentiality and the Rules. [51] Their submissions highlight how the common law implied undertaking of confidentiality has been incorporated into Rule 23.1. The respondents also point out various similarities between the Tribunal's Rules and the Supreme Court Civil Rules, and they cite *Duncan* and other court decisions

[51] Respondents' October 9, 2018 submission. They cite case law on the implied undertaking of confidentiality: *Duncan v. Lessing*, 2018 BCCA 9; *Sovani v. Gray et al.*, 2007 BCSC 403; *Jampolsky v. Shatler*, 2007 BCCA 439; *United Food & Commercial Workers Union, Local 1518 v. Sunrise Poultry Processors Ltd*., 2015 BCCA 354.

that addressed the implied undertaking of confidentiality. The respondents submit that the principles applied by the courts apply equally in the human rights forum.

[64] In addition, the respondents say they complied with Rule 23(2)(b) which says that a party applying for an order that a non-party deliver a copy of a document must provide the non-party with a copy of the application. They also argue that Rule 23(2) does not authorize the Tribunal to decide whether a party may make an application or limit what is to be contained in the application.

[65] The complainant disputes the respondents' assertions that the disclosure was required or authorized by law.[52] She also says that neither the Code nor the Rules required the respondents to disclose the entire Application to the non-parties, and at no time did the Tribunal order the respondents to disclose the entire Application to the non-parties. The complainant also cites the Tribunal's decision on the respondents' Application, where the Tribunal member said, "I note that providing that information which was obtained through document disclosure by [the complainant] may have been in violation of Rule 23.1…."[53]

[66] The complainant also disagrees with the respondents' assertion that the way the courts have addressed this issue applies equally in the human rights context. She says:

> There is no doubt that the BC Supreme Court legal framework permits such disclosure in that forum. But again, this complaint arises from conduct governed by different laws than the BC Supreme Court litigation process.
> …
> The jurisprudence cited by [the respondents] relating to the balance between privacy rights and disclosure concerns in BC Supreme Court proceedings clearly supports the position that privacy rights, though recognized to be important, are generally subsumed to the interests of full disclosure and rigorous testing of evidence in open Supreme Court proceedings.
>
> However, the balance of privacy interests versus rigorous disclosure within the statutory purview of the BC Human Rights Tribunal has never been equated with the balancing of the same interests in a Court of inherent jurisdiction.
> …
> Ultimately, absent specific legislation within the *BC Human Rights Code* legal framework which permits disclosure of otherwise protected personal information, a party to a *BC Human Rights Code* proceeding that requires the disclosure of otherwise protected personal information in order to fairly present their case would need to get an order from the British Columbia

[52] Complainant's January 30, 2018 submission.
[53] *Jenkins v. Pacific Law Group and another, 2017 BCHRT 116* at para. 96.

Human Rights Tribunal in order to rely on the "required or authorized by law" exemptions in PIPA.[54]

*Analysis*

[67] PIPA does not define the term "law."[55] The *Interpretation Act* also does not define "law," but it says an "enactment" includes a "regulation", which in turn is defined as including a "rule…enacted…in execution of a power conferred under an Act."

[68] Section 27.3 of the Code confers power on the Tribunal to make rules respecting practice and procedure, including disclosure of evidence. Therefore, I am satisfied that the Rules are an enactment and thus "law" for PIPA's purposes. Order P06-01 drew the same conclusion about the College of Dental Surgeons' rules made under the powers granted to it by the *Dentists Act*. Former Commissioner Loukidelis said that those rules were a form of "enactment" within the meaning of the *Interpretation Act* and thus law for PIPA's purposes.[56]

[69] As mentioned, Rule 23(2)(b) says that a party applying for an order that a non-party deliver a copy of a document *must provide* the non-party with a copy of the application. The respondents say that they complied with the procedure under Rule 23(2)(b). They also submit that nothing in the Rules lets the Tribunal decide whether a party may make an application or what is to be contained in the application.

[70] I have reviewed what took place and find that the respondents made their Application under Rule 23(2) and as such, they were required to provide a copy to the non-parties. Any such application would necessarily contain the complainant's personal information, at a minimum their name and the fact that they had made a human rights complaint. There is nothing in Rule 23(2) that restricts the type or amount of personal information in applications initiated pursuant to Rule 23(2).

[71] Rule 23(2) also does not require the permission or consent of the opposing party or the Tribunal to serve the application on a non-party. Although the Tribunal member criticized the respondents' judgement regarding the structure of its Application and how it disclosed unnecessary personal information, she did not expressly find that they broke Rule 23(2). I am satisfied, therefore, that giving the non-parties the Application, and whatever personal information it contained, was authorized by Rule 23(3)(b) and thus authorized by law for the purposes of s. 18(1)(o).

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[54] Complainant's November 15, 2018 submission at p. 3.
[55] There is no definition in FIPPA either.
[56] Order P06-01, 2006 CanLII 13537 (BC IPC) at para. 44.

[72] Given that I find s. 18(1)(o) applies, it is unnecessary to decide if the other s. 18(1) provisions the respondents raise also apply.

***Section 17***

[73] In addition to the requirements related to consent, s. 17 is relevant in this case. Section 17 states:

> 17 Subject to this Act, an organization may disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances and that
>
> (a) fulfill the purposes that the organization discloses under section 10 (1),
>
> (b) for information collected before this Act comes into force, fulfill the purposes for which it was collected, or
>
> (c) are otherwise permitted under this Act.

[74] The first part of the s.17 requires that the purpose(s) of the disclosure be, in the eyes of a reasonable person, appropriate in the circumstances. The reasonable person standard is an objective one, and the idiosyncrasies, likes, dislikes or preferences of a particular individual do not determine the outcome.[57] The second part of s. 17 requires that the purpose(s) of the disclosure comply with either s. 17(a), (b) or (c).

[75] I found above that s. 8(1) applied in this case because there was deemed consent to the collection, use and disclosure of the complainant's personal information for the purposes of the Tribunal proceedings. There is no evidence that the respondents disclosed the complainant's personal information in the Application for any purpose other than the Tribunal proceedings. In my view, a reasonable person - knowing that the purpose for the disclosure was for the Tribunal proceedings - would consider that purpose to be appropriate in the circumstances. I also find that s. 17(c) applies. The purposes of the disclosure are otherwise permitted under the Act because the collection, use and disclosure is permitted by s. 8(1) and/or 18(1)(o).

[76] The complainant says the respondents' disclosure of her personal information was not reasonable or appropriate and it was inconsistent with s. 17.[58] However, s. 17 is about the *purposes* of the disclosure and it does not place additional limits on disclosure as the complainant suggests. [59] Section 17

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[57] Order P05-01, *K. E. Gostlin Enterprises Ltd., Re*, 2005 CanLII 18156 at para. 55.
[58] Complainant's January 30, 2018 submission at p. 7.
[59] For a similar statement about the parallel language in ss. 11 (collection) and 14 (use) see Order P13-01, *Kone Inc (Re)*, 2013 BCIPC 23 at para. 73. Order P13-02, *ThyssenKrupp Elevator (Canada) Limited (Re)*, 2013 BCIPC 24 at para. 68.

ensures that the purposes of the disclosure fulfill the purposes for which the information was collected or are otherwise permitted under PIPA.

[77] As I see it, the actions of parties in a court or tribunal proceeding - and whether those actions were necessary or appropriate in light of that forum's governing law and procedures - is a matter best judged by that court or tribunal. I find support for this approach in s. 3(4) of PIPA. Section 3(4) states that PIPA does not limit the information available by law to a party to a proceeding. This provision ensures that PIPA does not interfere with, or override, statutory or common law processes or rules that make information available to a party to a proceeding.[60]

[78] Section 3(4) of PIPA requires that I interpret and apply PIPA in a way that does not limit the information available to PLG as a party to the legal proceedings before the Tribunal. In essence, the complainant is calling upon PIPA to censure, regulate and/or impose restrictions on what a party to a Tribunal proceeding can do to obtain information or evidence under the Tribunal's Rules. I believe that a decision on my part prohibiting a party to a Tribunal proceeding from disclosing personal information in an application made pursuant to Rule 23(2) would, effectively, limit the information available by law to that party and run contrary to s. 3(4).

[79] Thus, the issue of whether in this particular Tribunal proceeding the respondents complied with the Rules regarding applications for non-party disclosure is a matter that should be left to the Tribunal to decide. The Tribunal is an administrative tribunal empowered by statute to create the Rules that govern its proceedings and to enforce compliance with those Rules. Given it is the adjudicative forum where the complainant pursued her human rights complaint, it is best placed to understand the full context of what took place during its proceedings and to referee the parties' behaviour.

[80] Therefore, I will not set any limitations on the respondents' defence in the Tribunal proceedings. Any restrictions or critique should come from the Tribunal who is appropriately placed to judge the matter. In fact, as discussed above, the Tribunal has issued a ruling on the very same set of facts that led to this PIPA complaint. The respondents have already been censured and the complainant has received a remedy for the events that occurred when the Application was disclosed to the non-parties. In my view, it would not be proper for the OIPC to usurp the Tribunal's statutory authority to enforce compliance with its Rules, particularly when the Tribunal has the necessary mechanisms and remedies in place to address any improper conduct by the parties.

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[60] This is how the equivalent provision in Alberta's *Personal Information Protection Act*, s. 4(5)(b), has been interpreted: *Peter Choate & Associates Ltd v Dahlseide*, 2014 ABQB 117, at paras. 45–46.

[81] In conclusion, I find that the complainant has not established that the respondents disclosed her personal information contrary to the provisions of PIPA.

## CONCLUSION

[82] Under s. 52(3) of PIPA, I confirm the respondents' decision to disclose the complainant's personal information for the purposes of the Tribunal proceedings.

May 1, 2020

**ORIGINAL SIGNED BY**

Elizabeth Barker, Director of Adjudication

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