

**FEDERAL COURT**

**IN THE MATTER OF a reference pursuant to subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7 of questions or issues of law and jurisdiction concerning the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 that have arisen in the course of an investigation into a complaint before the Privacy Commissioner of Canada**

**B E T W E E N :**

**THE PRIVACY COMMISSIONER OF CANADA**

Applicant

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**COMPLAINANT'S CONFIDENTIAL MEMORANDUM OF FACT AND LAW**

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**OVERVIEW**

1. The Office of the Privacy Commissioner of Canada ("OPCC") has referred the following two questions to this Court for hearing and determination:

- a. Does Google LLC ("Google"), in the operation of its search engine service, collect, use or disclose personal information in the course of commercial activities within the meaning of s. 4(1)(a) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA") when it indexes web pages and presents search results in response to searches of an individual's name?
- b. Is the operation of Google's search engine service excluded from the application of Part 1 of PIPEDA by virtue of s. 4(2)(c) of PIPEDA because it

- involves the collection, use or disclosure of personal information for journalistic, artistic or literary purposes and for no other purpose?
2. The Complainant submits that the first question should be answered in the affirmative, the second question in the negative.
  3. With respect to PIPEDA's notion of commercial activities:
    - a. every relevant principle of statutory interpretation favours a broad interpretation;
    - b. the relevant case law has established that using personal information on web pages to generate advertising revenue or using it as an advertisement in itself is a commercial activity; and
    - c. Google's search engine is at the heart of the online commerce sector that PIPEDA was specifically intended to regulate.
  4. With respect to whether Google's search engine is entirely encompassed within PIPEDA's notion of a journalistic purpose and whether journalism is the search engine's only purpose, the search engine fails at every stage of the test established by this Court in *Globe24h*.

## **I. FACTS**

5. The Complainant adopts the facts set out in the OPCC's Memorandum at paragraphs 16 through 33.
6. In addition, the Complainant relies on the following paragraphs of the complaint as important factual context underlying the issues in this Reference:
  3. Google's indiscriminate disclosure of its search profiles of the Complainant to anyone connected to his life, including to people to

whom he is vulnerable, have directly exposed him to harms including physical assault and employment discrimination, and have subjected him to persistent fear, particularly as new people enter his life.

4. Google's search service inescapably leads anyone who happens to search the Complainant's name to associate him with the crime of [REDACTED].
5. The police did briefly charge him with this offence in [REDACTED]. [REDACTED]  
[REDACTED]. The prosecution stayed the criminal proceedings against him at an early stage in [REDACTED]. He was never tried, much less found guilty of any offence. A prosecutor may only stay charges if they believe that no offence was committed, if there is no reasonable prospect of conviction due to insufficient evidence, or if prosecution is not in the public interest.
6. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

● **Google's search profile of the Complainant**

7. The Complainant had not consented to making his [REDACTED] public, nor his [REDACTED], nor still any of his other personal information. Nonetheless, whenever someone searches his name, the majority of the uniform resource locators ("URLs") and associated data that Google now discloses and has disclosed since [REDACTED] inaccurately associates him with [REDACTED].
8. These inaccurate, misleading, and out-of-date URLs can be divided into four groups  

[...]
11. The third group of URLs are still more inaccurate than the rest, and even more prejudicial to the Complainant. The stories baselessly associate him by name with the [REDACTED]  
[REDACTED].

[...]

● **Harms caused by the disclosure of the profile**

13. Google's disclosure of its search profile of the Complainant has directly brought harm upon him, including physical assault, lost employment opportunities, and severe social stigma.
14. The Complainant began having difficulty securing rental accommodations following Google's aggregation of the profile of URLs listed above. He feared the difficulty was caused by the profile. A landlord of an apartment for which he had applied later called him, inviting him to come back to visit the property, only to punch him in the face and send him tumbling down a flight of stairs, while yelling at him that he doesn't rent to [REDACTED]. The incident confirmed his fears, and deepened the anxiety that has come to permeate his interactions with others.
15. He began to experience similar difficulties in securing employment, and even job interviews, and is convinced that his profile is having at least some effect in this respect. His everyday social relationships have also been undermined by Google's search profile.
16. These examples harmfully affect the Complainant's everyday life, as do many other situations in which he suspects but has no means to prove that his negative treatment has resulted from Google's search profile.

[...]

97. New invasions of the Complainant's privacy occur each time a new person becomes privy to his [REDACTED], and the serious and concrete harms that he has suffered will continue along with them.
98. Google's disclosure of the Complainant's search profile also short-circuits the anti-discrimination protections guaranteed by instruments such as the Ontario *Human Rights Code* against employment discrimination on the basis of sensitive information including [REDACTED]; record of offences; and disability, which includes health conditions [REDACTED]. The law provides similar guarantees against discrimination in other facets of life such as housing accommodations and with respect to service provision. The fact that this information is available to employers, landlords, and anyone else, all of whom regularly use search engines for research purposes, circumvents the intended protections at the click of a button. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

99. [REDACTED]

[REDACTED]

PIPEDA Complaint Form, dated June 16, 2017 [footnotes omitted] (**Exhibit A to the Affidavit of Natalie Lachance, affirmed May 14, 2019 [Lachance Affidavit], p. 15).**

## II. POINTS IN ISSUE

7. The following points are in issue before this Court:
- a. Does Google, in the operation of its search engine service, collect, use or disclose personal information in the course of commercial activities within the meaning of s. 4(1)(a) of PIPEDA when it indexes web pages and presents search results in response to searches of an individual's name?
  - b. Is the operation of Google's search engine service excluded from the application of Part 1 of PIPEDA by virtue of s. 4(2)(c) of PIPEDA because it involves the collection, use or disclosure of personal information for journalistic, artistic or literary purposes and for no other purpose?

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [PIPEDA], ss. 4(1)(a), 4(2)(c).

### III. SUBMISSIONS

8. Many of the submissions made in the OPCC's Memorandum of Fact and Law echo those made by the Complainant in the underlying complaint, dated June 16, 2017, and in the Complainant's letter to the OPCC, dated September 10, 2018. As such, the Complainant will avoid repeating these submissions to the extent feasible.

PIPEDA Complaint Form, dated June 16, 2017 (**Exhibit A to the Lachance Affidavit, p. 11**).

Letter from Mark Phillips to Brent Homan, dated September 10, 2018 (**Exhibit O to the Lachance Affidavit, p. 204**).

#### A. Commercial Activity

9. The first Reference question asks whether Google's search engine falls within PIPEDA's scope as set out in s. 4(1). Section 4(1) of PIPEDA provides that:

This Part applies to every organization in respect of personal information that

(a) the organization collects, uses or discloses in the course of commercial activities ...

PIPEDA, s. 4(1)(a).

10. The central issue in dispute is whether Google is engaging in "commercial activity" through the operation of its search engine. For the reasons that follow, the Complainant submits that the operation of Google's search engine falls within the scope of "commercial activity".

***i. A large and liberal interpretation of "commercial activity" should be adopted by this Court***

11. "Commercial activity" is defined in s. 2(1) of PIPEDA as follows:

**commercial activity** means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character,

including the selling, bartering or leasing of donor, membership or other fundraising lists. (*activité commerciale*)

PIPEDA, s. 2(1).

12. What constitutes "commercial activity" in the context of PIPEDA depends on the general principles governing statutory interpretation, which include a consideration of the text and purpose of the provision in question, the purpose of the statutory framework as a whole, and the context.

*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

13. In addition to the considerations identified in the OPCC's Memorandum, further relevant considerations also weigh in favour of a large and liberal interpretation of the term's ambit.

14. The purpose of Part I of PIPEDA is set out in s. 3 of the Act, which provides that:

The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

PIPEDA, s. 3.

15. A unanimous Supreme Court of Canada, after observing that the purpose of Alberta's *Personal Information Protection Act* ("PIPA") "is almost identical to that of the PIPEDA", described PIPA's purpose as follows:

The focus is on providing an individual with some measure of control over his or her personal information. The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at

the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as “quasi-constitutional” because of the fundamental role privacy plays in the preservation of a free and democratic society.

*PIPA*'s objective is increasingly significant in the modern context, where new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purposes.

*Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 [*AIPC v. UFCW*] at paras. 19–20 [references omitted] (**Book of Authorities of the OPCC [OPCC BOA], Tab 7, p. 294**).

*Personal Information Protection Act*, S.A. 2003, c. P-6.5 [*PIPA*], s. 3.

16. In addition to the values of autonomy, dignity and privacy, PIPEDA is specifically concerned with regulating “electronic commerce”, as the statute’s long title indicates.

*State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736 [*State Farm*] at paras. 103–104 (**OPCC BOA, Tab 33, pp. 1269-1270**).

17. Importantly, PIPEDA is part of a global system of legal frameworks intended to enable international information sharing and commerce by ensuring public confidence that personal information will be adequately protected wherever it may be transferred in the world.

*AIPC v. UFCW* at para. 13 (**OPCC BOA, Tab 7, p. 744**).

*A.T. v. Globe24h.com*, 2017 FC 114 [*Globe24h*] at para. 49 (**OPCC BOA, Tab 6, pp. 248-249**).

18. This international context also militates in favour of a definition of “commercial activity” that affords comparable privacy protections to those provided in peer jurisdictions. Otherwise, PIPEDA’s purposes would be frustrated.

19. Data protection law in the European Union (“EU”) has particular relevance because Parliament adopted PIPEDA for the specific purpose of establishing and maintaining personal information protection safeguards that are sufficiently comparable to those in the EU. EU law requires that sufficient personal information protection standards are in place in order to maintain “Canadian business access to European markets.”

Standing Committee on Industry, Minutes of Proceeding, December 1, 1998  
**(Exhibit D.5 to the Affidavit of Sandy Ballott, sworn August 10, 2020,  
p. 412).**

20. The European Commission has determined that PIPEDA provides adequate protection for the purposes of authorizing personal information transfers to Canada from the EU.

European Commission, 2002/2/EC: *Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (OPCC BOA, Tab 44).*

21. In this light, it is notable that EU data protection law affords natural persons a right to request the de-listing of webpages containing personal information from Google’s search engine from search results returned for that person’s name.

22. As the European Commission’s determination of PIPEDA’s adequacy predates the recognition of the right to request de-listing in the EU (though not the statutory provisions on which it was founded), it is uncertain whether a narrow interpretation of “commercial activity” (which would remove Google from the ambit of privacy regulation in Canada, unlike in the EU) would affect this determination. However, it is clearly a risk

to Parliament's objective when enacting PIPEDA of ensuring continued Canadian access to European markets.

23. In its submissions before the OPCC, Google submitted that the operation of its search engine is not "commercial activity" because no one pays Google to perform a search — nor do website owners pay to have their pages indexed — and because, in any event, a service to assist in finding webpages is "not an inherently commercial activity".

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2  
**(Exhibit F to the Lachance Affidavit, p. 118).**

24. However, the definition of "commercial activity" is clearly broad enough to include novel business practices, such as those engaged in by Google, in which the service may be free to the user, but is paid for by advertising based on the user's search terms. Google does not provide its search engine out of the goodness of its heart. While it may provide a "free" service to users, that "free" service is paid for by advertising tied to searches and a user's search history, as well as other information about the user such as their location.

25. Moreover, if Google's submission was accepted, then the privacy safeguards that Parliament established through PIPEDA, which have the specific aim of regulating e-commerce activities, could be avoided by tech sector companies when their business model is based on sales to advertisers or other third parties, rather than to the service's users directly. It simply cannot be the case that the definition of "commercial activity" depends on a company's business model. The fact is that advertisers pay Google because of:

- a. its comprehensive indexing of websites, which often includes personal information;
- b. its market dominance in this field, which itself is based on its comprehensive indexing (including the harvesting of personal information in web pages);
- c. its ability to target advertisements at specific search users on the basis of vast amounts of personal information that it has in turn harvested about them (i.e. collecting and using personal information regarding its users); and
- d. proprietary algorithms which return search results (i.e. using and disclosing personal information in webpages).

26. If “commercial activity” does not include such a business model, then many highly successful tech sector companies, including Facebook and Twitter, will avoid regulation under PIPEDA altogether, even though they trade on the very personal information they collect from those same users who use their services for “free”. Parliament cannot have intended the absurd result that a tweak to a company's business model could mean that a relevant regulatory regime did not apply, especially where it chose such a broad definition. Given the prevalence of this business model in the tech sector, PIPEDA would effectively be moribund legislation as business practices evolve. In this context, PIPEDA's definition of “commercial activity” must be interpreted broadly to encompass any collection, use, or disclosure of personal information with a discernible relationship to the generation of profit or other commercial revenue.

27. Finally, a unanimous Supreme Court of Canada has also held that “[a]dministrative policy and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation”. In

the present case, while the Complainant submits that there is no doubt that Google's operation of its search engine is a "commercial activity", it is clear from both the OPCC's submissions in this Reference as well as its draft guidance that the OPCC considers Google's operation of its search engine to be a commercial activity. This should be given weight by the Court in the current Reference.

*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 37 (**Complainant's Book of Authorities [Complainant BOA], Tab 1, p. 14**).

28. In sum, the broadest possible interpretation of "commercial activity" is warranted in the context of complex online services, given the factors canvassed above and in the OPCC's Memorandum, including: (a) the large and liberal interpretation that is to be given to fundamental rights; (b) PIPEDA's place within the global network of personal information protection laws; and (c) the need to ensure that PIPEDA's protective purpose is not eviscerated by the novel business models of powerful online services.

***ii. Past cases militate in favour of Google's search engine being a "commercial activity"***

29. In the electronic commerce context, past cases have consistently held that when an organization uses personal information on webpages to generate advertising revenue or as an advertisement in itself, this constitutes "commercial activity", for example:

- a. In *A.T. v. Globe24h.com* ("*Globe24h*"), this Court held that PIPEDA applied to a respondent who "generated revenue from advertisements on his website". The website republished judicial decisions that the respondent had downloaded from CanLII using automated software;

*Globe24h* at para. 65 (**OPCC BOA, Tab 6, pp. 256-257**).

- b. The OPCC held in In PIPEDA Case #2009-008 that user posts and other personal information posted on Facebook is subject to PIPEDA even when collected, used or disclosed “in relation to a feature without an apparent direct commercial link” so long as that feature is “included to enhance the user’s experience on Facebook”; and

PIPEDA Report of Findings #2009-008 at paras. 11–12 (**Complainant BOA, Tab 2, pp. 26-27**).

- c. The OPCC further held in PIPEDA Case #2005-305 that a dog breeder’s website was subject to PIPEDA because the website “serves as an advertisement for a business whose purpose is to sell dogs, and is therefore a commercial activity.”

PIPEDA Case Summary #2005-305 (**Complainant BOA, Tab 3, p. 135**).

30. PIPEDA has also been held to apply to aspects of an organization with an indirect or loose connection to revenue generation outside of the electronic commerce context. For example, an insurance company’s ombuds service has been held to fall within the scope of “commercial activity” for the purpose of PIPEDA.

PIPEDA Report of Findings #2016-006 (**Complainant BOA, Tab 4, p. 138**).

31. Even when an organization does not have a profit motive, as is the case for not-for-profit organizations by definition, the organization can nonetheless carry on commercial activities for the purposes of PIPEDA if it generates revenue that has a commercial character.

See e.g. *Law School Admission Council Investigation*, 2008 CanLII 28249 (OPCC) at paras. 38–40 (**Complainant BOA, Tab 5, pp. 154-155**).

32. While even a non-profit venture may be captured by the definition of “commercial activity”, the case law and interpretive considerations applied in these cases indicate that, at a minimum, where a profit motive is connected to an activity, as in the present case, the activity is necessarily commercial for the purpose of PIPEDA. This is especially the case where one is considering a multijurisdictional online service such as Google. In the contemporary context, in which online business models increasingly rely on advertising revenue that is generated through the collection of massive quantities of personal information, a finding by this Court that these services are not engaged in commercial activity would create an enormous gap in PIPEDA's regulatory protection. Perversely, that gap would exempt precisely those e-commerce activities to which the statute is explicitly intended to apply.

***iii. Application to the present case***

33. Google's search engine satisfies the definition of “commercial activity” for the purposes of PIPEDA. Its search engine has a clearly discernible relationship to profit generation in that the personal information contained in the webpages Google indexes is used to sell advertisements at a profit, alongside search results that include this personal information. This is particularly true when a user searches another person's name, as is the context of the present Reference, but is also true for other uses of Google's search engine.

34. In its submissions to the OPCC, Google contended that its search engine activity is more properly characterized as “facilitating timely and easy access to information on the world wide web, which is not an inherently commercial activity.” While it may be true that a search engine could be operated without a connection to a profit motive, that is

not Google's search engine, the operation of which is one of the most profitable businesses in the world.

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2  
**(Exhibit F to the Lachance Affidavit, p. 118).**

35. The preliminary findings note that Google's advertising revenues totalled approximately USD\$55 billion over the first six months of 2018 alone. Although neither the OPCC's preliminary findings nor its Memorandum indicate the proportion of these revenues that are specifically attributable to Google's search engine, the British Columbia Supreme Court found in 2014 that the revenue generated specifically by Google's search engine was "about \$50 billion annually."

*Equustek Solutions Inc. v. Jack Inc.*, 2014 BCSC 1063 at para. 33 **(OPCC BOA, Tab 14, p. 652).**

36. Google's submissions in respect of the OPCC's preliminary findings of fact do not appear to dispute the fundamentals of the OPCC's description of how Google generates profit through advertising using its search engine. Rather, Google simply wants the OPCC (and now this Court) to accept that it runs two separate operations — one a non-commercial search engine and the other an advertising business — even though these businesses are inextricably intertwined. Advertisers pay Google because it operates a search engine that collects and discloses personal information, and they collectively pay it billions of dollars because it is very good at running that search engine that relies on harvesting personal information and targeting results based on that harvested personal information.

Letter from David T.S. Fraser to Brent, dated September 10, 2018, attached Draft Preliminary Findings of Fact – Jurisdiction Issues at paras. 43-48  
**(Exhibit N to the Lachance Affidavit at pp. 198-200).**

37. Put differently, the thrust of Google's submission to the OPCC was that PIPEDA only regulates what it referred to as "inherently commercial" activity, and since a search engine could in theory be operated without any connection to profit, its highly profitable search engine was equally exempted from regulation. This approach should be rejected.

38. In support of its position before the OPCC, Google relied on this Court's decision in *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada* ("*State Farm*").

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2  
**(Exhibit F to the Lachance Affidavit, p. 118).**

*State Farm* (OPCC BOA, Tab 33).

39. However, *State Farm* arose in a very particular context. In that case, a private investigator, who had been engaged by a defendant in civil proceedings relating to a motor vehicle accident, was held not to be carrying on commercial activities for the purposes of PIPEDA. This Court held in *State Farm* that "[t]he collection of information in order to properly defend a civil tort action has little or nothing to do with" PIPEDA's purposes. The Court described these purposes as being to regulate electronic commerce and to strike a balance between protecting personal information and commercial practice, within the overriding standard of reasonableness.

*State Farm* at paras. 101-105 (OPCC BOA, Tab 33, pp. 1268-1270).

40. The Court ultimately held as follows:

I conclude that, on a proper construction of PIPEDA, if the primary activity or conduct at hand, in this case the collection of evidence on a plaintiff by an individual defendant in order to mount a defence to a civil

tort action, is not a commercial activity contemplated by PIPEDA, then that activity or conduct remains exempt from PIPEDA even if third parties are retained by an individual to carry out that activity or conduct on his or her behalf. The primary characterization of the activity or conduct in issue is thus the dominant factor in assessing the commercial character of that activity or conduct under PIPEDA, not the incidental relationship between the one who seeks to carry out the activity or conduct and third parties. In this case, the insurer-insured and attorney-client relationships are simply incidental to the primary non-commercial activity or conduct at issue, namely the collection of evidence by the defendant Ms. Vetter in order to defend herself in the civil tort action brought against her by Mr. Gaudet.

*State Farm* at para. 106 (**OPCC BOA, Tab 33, p. 1271**).

41. In other words, the activity in question (collecting information for use in a lawsuit) was not itself primarily commercial, and so the fact that the defendant engaged a third party to undertake that activity on its behalf did not transform it into commercial activity.

42. Importantly, in support of this conclusion, Justice Mainville emphasized that PIPEDA was not intended to fundamentally alter civil litigation and undermine litigation privilege by prohibiting a defendant from collecting information about a plaintiff. It is understandable that a statute such as PIPEDA would have to be much more clear if Parliament intended it to fundamentally alter the administration of justice in civil proceedings. No such concerns arise if Google's search engine is subject to PIPEDA.

*State Farm* at paras. 99–100 (**OPCC BOA, Tab 33, pp. 1267-1268**).

43. The Court also noted that the matter did not touch upon electronic commerce in any way, and so was far removed from the purposes for which PIPEDA was enacted. In contrast, Google's search engine is at the very heart of electronic commerce.

*State Farm* at paras. 103–105 (**OPCC BOA, Tab 33, pp. 1269-1270**).

44. Moreover, it is arbitrary for Google to frame the relevant relationship as one between the search engine and its user or with the publishers of its indexed web pages, relationships that involve no payment, rather than one between the search engine and third-party advertisers, which is clearly of a commercial nature. These advertisers collectively pay Google substantial fees in exchange for having Google's search engine collect, use, and disclose personal and other information in connection with their advertisements.

45. The fact that ads do not appear on the specific results page when the Complainant's name is searched is irrelevant to the fundamental character of Google's activities. The issue on this Reference is the operation of its search engine as a whole, which is clearly of a commercial nature.

46. Google may also submit that compliance burdens militate against characterizing its search engine as a "commercial activity". In addition to being an irrelevant consideration, Google is able to manage these ostensible burdens in the European Union where it may be required, on request, to de-list results. Indeed, early concerns about the possible exponential growth of de-listing requests of the type the Complainant is seeking in his underlying complaint have proved unfounded and compliance with those regimes has instead proved to be manageable.

Bertram et al, "Three years of the Right to be Forgotten" at p. 5 (**Exhibit A to the Affidavit of Deanna Waters, affirmed June 14 2019**).

47. In any event, PIPEDA sets out a flexible framework that is generally compatible with the operation of search engines:

- a. PIPEDA incorporates flexible principles rather than rigid rules to best adapt to the changing technological context;

PIPEDA, Schedule 1.

- b. The overriding standard to meet is one of reasonableness;

PIPEDA, s. 5(3).

*State Farm* at para. 102 (**OPCC BOA, Tab 33, p. 1269**).

- c. Implied consent generally fulfills PIPEDA's consent requirements, which may also be interpreted flexibly when necessary, as long as individuals are given a reasonable opportunity to withdraw their consent.

PIPEDA, Schedule 1, Principles 4.3.6, 4.3.8.

## **B. Journalistic purposes**

### ***i. Formulation of the Reference Question***

48. Section 4(2)(c) of PIPEDA provides that Part 1 of PIPEDA "does not apply to [...] any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose."<sup>1</sup>

PIPEDA, s. 4(2)(c).

49. In order to fall within this exception (and in order for the second Reference question to be answered in the affirmative), all of the personal information involved in operating Google's search engine must be collected, used or disclosed for journalistic, artistic or literary purposes and for no other purpose.

<sup>1</sup> The second question framed for this Reference may give a false impression of the scope of this exception, as it refers to whether Google's search engine "involves" journalistic, artistic or literary purposes. The standard is in fact whether it *exclusively* collects, uses or discloses personal information for one of these purposes.

**ii. The legal test for journalistic purposes**

50. This Court established the elements of a journalistic purpose in *Globe24h*, where it held that:

The “journalistic” purpose exception is not defined in PIPEDA and it has not received substantive treatment in the jurisprudence. The OPCC submits that the Canadian Association of Journalists has suggested that an activity should qualify as journalism only where its purpose is to (1) inform the community on issues the community values, (2) it involves an element of original production, and (3) it involves a “self-conscious discipline calculated to provide an accurate and fair description of facts, opinion and debate at play within a situation”. Those criteria appear to be a reasonable framework for defining the exception. None of them would apply to what the respondent has done.

The Alberta Court of Appeal interpreted similar statutory language in Alberta’s *Personal Information Protection Act*, SA 2003, c P-6.5: *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130, [2012] AJ No 427, aff’d [2013] 3 SCR 733 [*United Food*]. Specifically, in considering the adjective “journalistic”, the Court of Appeal noted that “it is unreasonable to think that the Legislature intended it to be so wide as to encompass everything within the phrase “freedom of opinion and expression””: *United Food*, above, at para 56. Further, the Court noted that “[n]ot every piece of information posted on the Internet qualifies [as journalism]”: *United Food*, above, at para 59.

*Globe24h* at paras. 68-69 (**OPCC BOA, Tab 6, pp. 257-258**).

51. This articulation of the standard has since been adopted under an analogous provision in British Columbia’s *Personal Information Protection Act*.

*Surrey Creep Catcher (Re)*, 2017 BCIPC 38 at paras. 18–19 (**Complainant BOA, Tab 6, pp. 167-168**).

*Personal Information Protection Act*, S.B.C. 2003, c. 63, s. 3(2)(b).

52. All three conditions must be satisfied to qualify as journalism for the purposes of this exception. Just as this Court found that none of these elements was present in *Globe24h*, the same is true in this case for essentially the same reasons:

- a. First, Google has not created content to inform the community. Rather, it has indiscriminately indexed as many URLs as permitted by web sites, without contributing to their content and without regard to the quality of that content or the nature of the information these URLs contain;
- b. Second, the search function is, by its very nature, not an original production; and
- c. Third, the process of indexing websites (“crawling”) does not involve a self-conscious journalistic discipline, nor efforts to provide an accurate and fair description of elements in any one particular situation.

53. For these reasons, Google’s search engine is not “journalism” for the purposes of PIPEDA.

***iii. Analogous privacy frameworks support the conclusion that Google’s search engine is not journalism***

54. Statutory exceptions for journalistic purposes exist across the global system of personal information protection frameworks to which PIPEDA belongs, and have been interpreted not to apply to Google’s search engine.

55. Although Google does not appear to have specifically pleaded the journalistic purposes exception in *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, the European Court of Justice nonetheless held that the statutory exception in the EU’s *Data Protection Directive 95/46* regarding the collection, use, and disclosure of personal information carried out “solely for journalistic purposes” did not apply to search engine results.

*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (13 May 2014), ECJ Case C-131/12 at para. 85 (**OPCC BOA, Tab 17, p. 721**).

56. However, Google did plead that its search engine was exempt from the UK *Data Protection Act 1998* by virtue of that law's journalistic purposes exception in *NT1 and NT2 v. Google LLC*, which the High Court of England & Wales rejected:

[T]he processes of obtaining, indexing, storing, and making available information that are engaged in by an ISE [Internet Search Engine] are automated, and governed by computer-based algorithms. The “All” search function is carried out indiscriminately, in the sense that the search criteria have no regard to the nature of the source publications. Searches for “news” may target a narrow range of sources. But whatever the nature of the search in question, when Google responds to a search on an individual’s name by facilitating access to journalistic content about that individual, this is purely accidental, and incidental to its larger purpose of providing automated access to third party content of whatever nature it may be, that it has identified and indexed and meets the search criteria specified by the user. That is a commercial purpose which, however valuable it may be, is not undertaken for any of the special purposes, or “with a view to” the publication by others of journalistic material within s 32(1)(a) [of the UK *Data Protection Act 1998*].

*NT1 and NT2 v. Google LLC*, [2018] EWHC 799 (QB) at para. 100 (**OPCC BOA, Tab 25, pp. 984-985**).

*Data Protection Act 1998*, 1998, c. 29, s. 32.

**iv. Distinguishing Journalists from Intermediaries**

57. In support of its position before the OPCC with respect to journalistic purposes, Google cited Order P2005-004 from the Office of the Information and Privacy Commissioner of Alberta, in which Commissioner Work held that the Calgary Herald's publication of a news story fell outside of the scope of PIPA, the applicable provincial privacy scheme

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2 (**Exhibit F to the Lachance Affidavit, p. 118**).

58. However, the Court has already made clear in this Reference that the issue is not whether the webpages that are indexed by Google's search engine include articles that were published by media organizations for a journalistic purpose, but rather whether Google's search engine is itself operated for a journalistic purpose, and for no other.

Amended Order of Case Management Judge Alexandra Steele, dated July 31, 2020 at para. 49.

59. The Complainant anticipates that the intervenor, CBC/Radio Canada (the "CBC"), will advance the submission that its journalistic material is not subject to PIPEDA. However, with respect, neither PIPEDA nor the Reference questions address the type of journalistic material created by the CBC; the issue is not whether the CBC collects, uses or discloses personal information, but whether a search engine itself collects, uses or discloses such information for a journalistic purposes, and for no other. This is the same fallacy that Google raises in defence of its search engine, but it does not change the fact that the CBC's purposes are different from Google's.

60. While Google asserted before the OPCC that the journalistic function of its search engine is "particularly acute" with respect to webpages published by "legitimate Canadian news outlets", it also asserted that its search engine serves a "journalistic function" across its entire operation.

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2  
**(Exhibit F to the Lachance Affidavit, p. 118).**

61. Even if Google's search engine could be said to have a journalistic purpose when its search results include news articles (which the Complainant denies), non-news webpages constitute the vast majority of its indexed content, for which Google acknowledges its journalistic function is less "acute". The Complainant submits it is non-

existent. The presence of personal information in these non-news webpages on their own is irreconcilable with a characterization of the search engine as serving a journalistic purpose as a whole. As the UK High Court held in *NT1*, the fact that the search engine's crawler happens to find and harvest news articles among all of the other material on the internet is “purely accidental, and incidental to its larger purpose of providing automated access to third party content of whatever nature it may be”.

*NT1 and NT2 v. Google LLC*, [2018] EWHC 799 (QB) at para. 100 (**OPCC BOA, Tab 25, pp. 984-985**).

62. A determination that Google's search engine is operated for a purely journalistic purpose would have the strange effect of exempting from PIPEDA's protections the entirety of the remaining non-news content the search engine indexes. This cannot be what Parliament intended.

63. Even if Google's search engine could be characterized as having a journalistic purpose (which is denied), it would nonetheless not have a solely journalistic purpose, as PIPEDA requires.

*Globe24h* at para. 72 (**OPCC BOA, Tab 6, pp. 259**).

64. Google itself describes its search engine's dominant purpose not as a journalistic one, but rather as "facilitating timely and easy access to information on the world wide web".

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2 (**Exhibit F to the Lachance Affidavit, p. 118**).

65. In *Globe24h*, this Court identified one of the purposes of the collection, use, and disclosure of personal information by the respondent's website as being "to generate

advertising revenue by driving traffic to his website through the increased exposure of personal information in search engines.”

*Globe24h* at para. 71 (**OPCC BOA, Tab 6, pp. 258**).

66. Equally, Google’s purpose for collection, use and disclosure of personal information through its search engine is also as a vehicle to generate advertising revenue for Google by driving traffic to the site and thus cannot be solely journalistic.

***v. Google is also not operating its search engine for artistic nor literary purposes***

67. In addition to journalistic purposes, s. 4(2)(c) of PIPEDA also exempts artistic and literary purposes from the scope of Part 1 of PIPEDA. Again, these exceptions only apply where the artistic or literary purpose is the sole purpose for the collection, use or disclosure of personal information.

PIPEDA, s. 4(2)(c).

68. Google has not alleged that it operates its search engine for artistic purposes, nor does it do so.

69. However, Google has alleged that it operates its search engine for literary purposes, though without providing any further explanation of how that may be the case.

Letter from David T.S. Fraser to the OPCC, dated March 2, 2018 at p. 2  
**(Exhibit F to the Lachance Affidavit, p. 118)**.

70. As with journalistic purposes, literary purposes, at a minimum, require some element of original production and self-conscious discipline in the production or criticism

of literary works. Google's search engine meets neither of these conditions, and it is thus unable to rely on this exception.

71. In light of the foregoing, the Complainant respectfully submits that the first reference question be answered in the affirmative, the second in the negative.

#### IV. ORDER SOUGHT

72. The Complainant respectfully requests that this Court answer the first reference question in the affirmative and the second reference question in the negative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23 day of September, 2020.**



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## V. LIST OF AUTHORITIES TO BE REFERRED TO

No.	Description	Para.
1.	<i>A.T. v. Globe24h.com</i> , 2017 FC 114	49, 65, 68-69, 71-72
2.	<i>Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401</i> , 2013 SCC 62	13, 19-20
3.	<i>Equustek Solutions Inc. v. Jack Inc.</i> , 2014 BCSC 1063	33
4.	<i>Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González</i> (13 May 2014), ECJ Case C-131/12	85
5.	<i>Law School Admission Council Investigation</i> , 2008 CanLII 28249 (OPCC)	38-40
6.	<i>Nowegijick v. The Queen</i> , [1983] 1 S.C.R 29	p. 37
7.	<i>NT1 and NT2 v. Google LLC</i> , [2018] EWHC 799 (QB)	100
8.	PIPEDA Case Summary #2005-305	
9.	PIPEDA Report of Findings #2009-008	11-12
10.	PIPEDA Report of Findings #2016-006	
11.	<i>Rizzo &amp; Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27	21
12.	<i>State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada</i> , 2010 FC 736	99-106
13.	<i>Surrey Creep Catcher (Re)</i> , 2017 BCIPC 38	18-19

## APPENDIX A

### *Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5*

#### **Definitions**

**2 (1)** The definitions in this subsection apply in this Part.

[...]

**commercial activity** means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering, or leasing of donor, membership or other fundraising lists. (*activité commerciale*)

#### **Purpose**

**3** The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

#### **Application**

**4 (1)** This Part applies to every organization in respect of personal information that

- (a) the organization collects, uses or discloses in the course of commercial activities;

#### **Limit**

**(2)** This Part does not apply to

[...]

- (c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.

#### **Appropriate purposes**

**5 (3)** An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

## **Schedule 1**

### **4.3.6**

The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. Consent can also be given by an authorized representative (such as a legal guardian or a person having power of attorney).

### **4.3.8**

An individual may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice. The organization shall inform the individual of the implications of such withdrawal.

### ***Personal Information Protection Act, S.A. 2003, c. P-6.5***

#### **Purpose**

**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.

### ***Personal Information Protection Act, S.B.C. 2003, c. 63***

#### **Application**

**3 (2)** This Act does not apply to the following:

[...]

(b) the collection, use or disclosure of personal information, if the collection, use or disclosure is for journalistic, artistic or literary purposes and for no other purpose;

### ***Data Protection Act 1998, 1998, c. 29***

#### **32 Journalism, literature and art.**

(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—

(a) the proceeding is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.