

[This ruling was modified on judicial review. See: S1 GS-23775]



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island**

Order No. PP-10-001

Re: Island Regulatory and Appeals Commission

Prince Edward Island Information and Privacy Commissioner

Judith M. Haldemann, Acting Commissioner

June 4, 2010

Summary:

The Complainant raised a complaint that the Public Body violated his privacy by publishing an order naming him on its website. The Complainant was concerned that a Google search of his name results in the case being displayed prominently at the top of the search. The Public Body is a quasi-judicial tribunal which publishes, on its website, its decisions under the statutes for which it is responsible. The Public Body notifies all parties in writing that it holds its hearing in public. The Commissioner found that there is no expectation of privacy for a person who appears before this tribunal.

Sections considered: *Freedom of Information and Protection of Privacy Act*, cl. 37(1)(t), (z)

I. BACKGROUND

The Complainant raised a complaint that the Public Body violated his privacy by publishing an order naming him on its website. The Complainant was concerned that a Google search of his name results in the case being displayed prominently at the top of the search. The Public Body is a quasi-judicial tribunal which publishes, on its website, its decisions under the statutes for which it is responsible. The Public Body notifies all parties in writing that it holds its hearing in public.

II. ISSUES

The issue to be determined in this case is whether the Public Body violated the Complainant's privacy by publishing the case in which he was involved on its website, thereby disclosing the Complainant's name without his consent, contrary to section 37 of the FOIPP Act.

III. SUBMISSIONS OF THE PARTIES

The Complainant submits that the Public Body was not permitted to publish his name as part of the name of a case heard by it, because the Complainant did not give his consent to have his name published online. The Complainant says

IRAC is violating my privacy by publishing my name online without my consent. I never allowed IRAC to publish my name. I DO NOT allow IRAC to publish my name. A google search on my name leads to the Commission's Order appearing at the top of the search.

The Complainant says

IRAC says it is IRAC's practice since 1977 [sic 1991] to publish personal information (names) online.

Was this practice ... reviewed and approved by the Acting Information and Privacy Commissioner back in [1991] before it was adopted?

If an institution is doing something wrong, no matter how long it has been doing it, if it is wrong, it has to change it.

I have no problem with the fact that IRAC publishes all orders online, My Major Concern is that Personal Information (Names) should not be published online. If I was informed about that, I would NEVER have appealed.

After making some suggestions on an alternative approach that the Public Body could take, the Complainant points out that

Workers Compensation Board does not publish Names online.

The Office of the Information and Privacy Commissioner does not publish Names online.

The Public Body submits that

It has been the policy of the Commission, since its inception in 1991, that its hearings are open to the public, including the media. The parties to a rental appeal are advised in advance that the appeals process is a public process....

A Notice of Appeal Hearing is sent by the Commission to all parties to a rental appeal. A copy of the Notice prepared for this particular appeal is enclosed. The Notice stipulates, in part, that:

“AND FURTHER TAKE NOTICE THAT the hearing will be noticed on the Commission’s public web site at www.irc.pe.ca and will be open to the public ...

d) Unless otherwise indicated, all materials submitted and Orders of the Commission will be made public.”

In keeping with this policy of openness and transparency, notices stating the parties involved, the date, time and location of all hearings are posted on our website to ensure the public has the opportunity to become aware of all hearings.

The Public Body states its reliance on clauses 37(1)(t) and (z) of the FOIPP Act and goes on to submit that

Each appeal hearing results in an Order and all Orders issued by the Commission are then made available to the public by posting them on our website. This has been the Commission's practice since the creation of our website in 1997. Furthermore, the Commission has retroactively posted to its website all of its Orders issued since its inception. This practice of publishing Orders in their original form enhances access for the public, facilitates research and is in keeping with the open court principle embraced by the Canadian judicial system and adopted by many quasi-judicial bodies in Prince Edward Island and other Canadian jurisdictions. Many quasi-judicial bodies in Canada post their orders, including the names of parties, witnesses, and counsel that attend their hearings, on their websites.

The Public Body submits that reference to the Workers Compensation Board ("WCB") is "not relevant to this complaint because hearings of the Workers Compensation Board and the Workers Compensation Appeals Tribunal are not open to the public nor has the information collected during those appeal hearings been routinely disclosed to the public".

IV. ANALYSIS

The Public Body is a quasi-judicial tribunal that adjudicates on issues raised under the statutes for which it is responsible.

The Complainant submits that the Public Body did not have his consent to release his personal information and should not have released his name on its website as part of an order published by the Public Body. The Complainant's concerns centre, not on the publication by the Public Body on its website of the orders that it issues, but on the publication of the names of the parties to the Public Body's orders. The Complainant submits that a Google search of his name results in the Public Body's order prominently being displayed, and that this negatively affects the Complainant's business prospects.

The Complainant questioned whether the Commissioner reviewed the policies of the Public Body before the Public Body started posting its decisions to its website. The Public Body came into being by statute in 1991 and started posting its orders on its website in 1997. The FOIPP Act

came into force in November, 2002. This is the first time that this office has considered a review involving this Public Body.

I have reviewed the submissions of the parties, the FOIPP Act, the *Island Regulatory and Appeals Commission Act* and the *Rental of Residential Property Act*, as well as administrative law textbooks. There is nothing in any of these Acts that prevent this particular tribunal from publishing its decisions.

The Public Body relies on clauses 37(1)(t) and (z) of the FOIPP Act, which say

37. (1) A public body may disclose personal information only
- (t) for use in a proceeding before a court or quasi-judicial body to which the Government of Prince Edward Island or a public body is a party;
 - (z) when the information is available to the public;

I do not agree that clause 37(1)(t) of the Act applies to this case. Clause (t) is intended to ensure that a public body can release personal information in a situation where the public body is a party before a quasi-judicial tribunal, but in this case the public body is the quasi-judicial tribunal itself. Clause 37(1)(z) has some applicability, but it is a circular argument, since the information is available to the public because the quasi-judicial tribunal makes it available. Neither of these clauses are compelling arguments in themselves for making the names of the parties available to the public, and, in fact, these clauses are intended to provide privacy protection, not disclosure.

The Complainant argues that the WCB and this office do not publish the names of parties to a case, when posting their decisions on their websites. I agree that this assertion is true. WCB is a quasi-judicial tribunal that adjudicates on issues related to the awarding of compensation to private individuals who fall within a limited category of people; i.e. injured workers. WCB matters are not decided in a public forum. The issues brought before the WCB are individual compensation issues that can be determined and argued without reference to a particular individual. It is not in the public interest to release the names of injured workers or the amount of

compensation that might be awarded to them. Thus, the manner in which WCB deals with publication of its orders is irrelevant to this case. Similarly, the decisions made by the Information and Privacy Commissioner under the FOIPP Act relate to matters of access procedure and privacy policy. The names of applicants, complainants, or third parties are not relevant to the issues to be determined by the Commissioner, and therefore, these names are not included in orders made under the FOIPP Act. There is no requirement in the FOIPP Act for an applicant or third party to be named. More importantly, a public body must not differ in its response to an access request depending on the name of the applicant. As for a privacy complaint, there is an obvious interest that a complainant's name be kept confidential.

The Public Body notified the Complainant in various ways that the appeal hearing was open to the public. The Notice of Appeal Hearing that the Complainant received stated that "the hearing will be noticed on the Commission's public web site at" In addition, the Notice stated that "[U]nless otherwise indicated, all materials submitted and Orders of the Commission will be made public."

I am not convinced by the Complainant's argument that he did not know that his name would be released. A cursory look at the Public Body's website shows that the names of the parties on orders are posted there. It is no longer a curiosity that a person's name on an order made at public hearing will be listed in search engine results on the Internet. As well, I cannot agree with the Complainant that the Public Body's prior assertions to him that the matter would be heard at a public hearing in any way implied that his name would be excluded from the publication of the order. If publication of an order is justified because the quasi-judicial tribunal provides substantial reasons for its hearings being open to the public, that may then lead to the publication of its orders without redaction. If publication of the names of the parties is justified, there is no automatic rule that differentiates the methods of publication. Not all quasi-judicial tribunals fit into the open hearings category, but I find that IRAC does because it decides issues of general application in a manner similar to court proceedings, under the statutes that it is responsible to administer. This does not mean that most quasi-judicial tribunals are expected to conduct open

hearings; nor does it mean that I agree with publishing the names of parties to a decision or order on the Internet. It simply means that I recognize that some quasi-judicial tribunals hold public hearings similar to court proceedings and uphold public openness to the extent of publishing the proceedings or orders in order to be accessible to the public at large. The closer a quasi-judicial tribunal comes to being the arbiter of offences under the law, the closer it comes to falling under the rubric of the open court (tribunal) concept.

The publication of names in orders of quasi-judicial tribunals is a matter of concern to Privacy Commissioners across the country. There are discussions and concerns that have been raised on whether the names of the parties should be considered as non-essential to the promulgation of the principles decided in a particular case. This is an evolving issue that is not yet settled. The Saskatchewan Privacy Commissioner has released guidelines on his website on publishing personal information electronically (*Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*). At this time, I will not order the Public Body to remove the names of parties from its orders that are published electronically. However, I recommend that the Public Body carefully consider the guidelines released by the Saskatchewan Commissioner to determine whether removal of the names from its orders would be a reasonable action on its part. I have attached these guidelines to this order.

In reviewing the Public Body's orders that were published on its website, I noted that the names of non-party witnesses were published in the body of an order; eg., Order LA10-03. The publication of the names of witnesses in a case before a quasi-judicial tribunal is problematic with respect to witnesses who are not parties to the proceeding. I was surprised to find this practice and, in my opinion, there is no compelling reason to publish the names of non-party witnesses. These are public hearings, and the witnesses give evidence in public, but publishing the non-party witness names in a written order is an unnecessary invasion of their privacy. The names of non-party witnesses must, in future, be severed from both the title and the body of orders of the Public Body that are published by any method. Names of non-party witnesses published in any past orders of the Public Body must be severed before their online publication.

The Public Body must contact this office and provide a reasonable estimate of how many orders would be affected and how long severance would take, for approval of the Commissioner.

VII. FINDINGS

1. I find that the Public Body is a quasi-judicial tribunal and its proceedings are open to the public. I recommend that the Public Body consider followings the guidelines issued by the Saskatchewan Information and Privacy Commissioner, as discussed above.

2. I find that the Public Body is not justified in publishing the names of non-party witnesses in its orders and that the personal information of non-party witnesses must be severed from the Public Body's orders that are published by any method.

3. I find that there is, at this time, no expectation of privacy for a person who appears as a party before this Public Body, because the issues brought for hearing before the Public Body are issues that turn on compliance with public statutes of general application. I recommend that it is desirable to remove the names of the parties from decisions or orders published online. I strongly recommend that the Public Body consider the guidelines of the Saskatchewan Privacy Commissioner in determining how to remove the names of parties from the Public Body's decisions or orders that are published online.

VIII. CONCLUSIONS

Thank you to the parties for their submissions. This complaint gave me an excellent opportunity to analyze privacy concerns in a new context. This type of investigation allows me as Commissioner to review the FOIPP Act and better understand the statutory means of protecting the personal privacy of all individuals whose information is collected by a public body. In addition, in this particular case, it allowed me to delineate the boundaries between personal information which is inviolable, and personal information which is released to the public domain.

Based on my findings, I recommend that the Public Body consider the implications of the attached guidelines produced by the Saskatchewan Privacy Commissioner to determine how the names of parties could be removed from decisions or orders of the Public Body published online.

Based on my findings, I order that the Public Body refrain from publishing in future, by any method, the personal information of non-party witnesses in its orders. I order that the Public Body provide this office with a reasonable estimate of how many past orders will require severance of the personal information of non-party witnesses in its orders, for further direction of the Commissioner.

In accordance with subsection 68(1.1) of the FOIPP Act, the Public Body shall not take any steps to close its file in this matter until the expiry of the time period for bringing an application for judicial review of this order under section 3 of the *Judicial Review Act*.

Judith M. Haldemann
Acting Information and Privacy Commissioner