Office of the
Saskatchewan Information
and Privacy Commissioner

DISREGARD
DECISION 237-2020

Saskatchewan Power Corporation

November 9, 2020

Summary: Saskatchewan Power Corporation (SaskPower) applied to the Commissioner for authorization to disregard the Applicant's access to information request under section 45.1 of *The Freedom of Information and Protection of Privacy Act*. The Commissioner found that the Applicant's access to information request was repetitious, systematic and an abuse of the right of access. As such, the Commissioner authorized SaskPower to disregard the access to information request.

I BACKGROUND

[1] On October 16, 2020, Saskatchewan Power Corporation (SaskPower) received the following access to information request from the Applicant:

> I wish to access the following records:
>
> 1. Memo dated January 21, 2016, that RPS established surveillance to obtain my "Cast off" DNA. The memo was sent to [employee name] and senior leadership team. The memo indicated that Regina Police Service (RPS) advised [name] that RPS has set up surveillance for the sole purpose of obtaining my "cast-off DNA" to match with the positive DNA swab obtained at the crime scene. The memo went further to delineate that I, [Applicant] is focus and suspect in the investigation and that the DNA profile did not match other offenders.
>
> 2. All other records or internal and external communication related to obtaining my cast off DNA and surveillance on me.
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> 3. Documents provided to the Court as part of the Q.B.G 394 of 2018 action on privacy matter (Office or the Saskatchewan Information and Privacy Commissioner, Review Report 139-2017). Provide me with copies of all

documents withheld and redacted in the Review Report as well as documents you provided to the Court under seal on this matter. The records shall be disclosed in its native format. All attachments shall be printed separately and attached to the email containing the attachment. The RPS investigation on [Applicant] is completed and closed.

4. My private emails intercepted by [name] after my termination from SaskPower, and a report or emails [name] provided to [name].

[2] SaskPower did not respond to the Applicant's clarified request. Instead, on October 23, 2020, it made an application to my office seeking authority under section 45.1 of *The Freedom of Information and Protection of Privacy Act* (FOIP) to disregard the request on the grounds that the request amounted to an abuse of the right of access owing to its repetitious and systematic nature. Further, it asserted, that it was frivolous, vexatious and was not made in good faith. Subsection 45.1(3) of FOIP suspends the time for responding to a request where the government institution involved has sought relief under section 45.1 of FOIP.

[3] On October 27, 2020, my office provided notification to SaskPower and the Applicant that I would be considering the application to disregard the access to information request.

II DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[4] SaskPower is a "government institution" pursuant to subsection 2(1)(d)(ii) of FOIP. Thus, I have jurisdiction to consider this application to disregard.

2. Should SaskPower's application pursuant to subsection 45.1(2)(b) of FOIP be granted?

[5] Section 45.1 of FOIP provides government institutions the ability to apply to the Commissioner requesting to disregard an access to information request or a correction request. Section 45.1 of FOIP provides as follows:

> **45.1**(1) The head may apply to the commissioner to disregard one or more applications pursuant to section 6 or requests pursuant to section 32.
>
> (2) In determining whether to grant an application or request mentioned in subsection (1), the commissioner shall consider whether the application or request:
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> (a) would unreasonably interfere with the operations of the government institution because of the repetitious or systematic nature of the application or request;
>
> (b) would amount to an abuse of the right of access or right of correction because of the repetitious or systematic nature of the application or request; or
>
> (c) is frivolous or vexatious, not in good faith or concerns a trivial matter.
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> (3) The application pursuant to subsection 6(1) or the request pursuant to clause 32(1)(a) is suspended until the commissioner notifies the head of the commissioner's decision with respect to an application or request mentioned in subsection (1).
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> (4) If the commissioner grants an application or request mentioned in subsection (1), the application pursuant to subsection 6(1) or the request pursuant to clause 32(1)(a) is deemed to not have been made.
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> (5) If the commissioner refuses an application or request mentioned in subsection (1), the 30-day period mentioned in subsection 7(2) or subsection 32(2) resumes.

[6] An application to disregard is a serious matter as it could have the effect of removing an applicant's express right to seek access to information. However, FOIP recognizes that not all access to information requests are appropriate. Section 45.1 of FOIP exists to preserve the proper intent and functioning of the Act. Former British Columbia Information and Privacy Commissioner (BC IPC), David Loukidelis, said the following about the role of the equivalent provision in British Columbia's Act:

> …Access to information legislation confers on individuals such as the respondent a significant statutory right, *i.e.*, the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access…
>
> (BC IPC Order 99-01 at p. 7)

[7] In its application to my office, SaskPower submits that the access to information request of October 16, 2020, should be disregarded pursuant to subsection 45.1(2)(b) of FOIP.

[8] In order for subsection 45.1(2)(b) of FOIP to apply, the access to information request must be of such a repetitious or systematic nature that it can be said to be an abuse of the right of access. Both parts of the following test are considered:

1. Are the requests for access repetitious or systematic?
2. Do the repetitious or systematic requests amount to an abuse of the right of access?

[9] I will consider each of these questions.

1. Are the requests for access repetitious or systematic?

[10] *Repetitious* requests are requests that are made two or more times (BC IPC Order F10-01 at paragraph [16]).

[11] *Systematic* requests are requests made according to a method or plan of acting that is organized and carried out according to a set of rules or principles (BC IPC Order F13-18 at paragraph [23]). It includes a pattern of conduct that is regular or deliberate (Alberta Information and Privacy Commissioner (AB IPC) Request to Disregard F2019-RTD-01 at p. 9).

[12] Factors that can be considered when determining if requests are repetitious or systematic are as follows:

- Does the applicant ask more than once for the same records or information?
- Are the requests similar in nature or do they stand alone as being different?
- Do previous requests overlap to some extent?
- Are the requests close in their filing time?

- Does the applicant continue to engage in a determined effort to request the same information (an important factor in finding whether requests are systematic, is to determine whether they are repetitious)?

- Is there a pattern of conduct on the part of the applicant in making the repeated requests that is regular or deliberate?

- Does the applicant methodically request records or information in many areas of interest over extended time periods, rather than focusing on accessing specific records or information of identified events or matters?

- Has the applicant requested records or information of various aspects of the same issue?

- Has the applicant made a number of requests related to matters referred to in records already received?

- Does the applicant follow up on responses received by making further requests?

- Does the applicant question the content of records received by making further access requests?

- Does the applicant question whether records or information exist when told they do not?

- Can the requests be seen as a continuum of previous requests rather than in isolation?

(New Brunswick Information Privacy Commissioner Interpretation Bulletin, *Section 15 – Permission to disregard access request*)

[13] In its application to my office, SaskPower asserted that the Applicant was employed by SaskPower until March 2015 when the Applicant was terminated with cause. Beginning in April 2015, until the most recent request, the Applicant has submitted 10 access to information requests to SaskPower related to the termination and to previous requests made. The Applicant has also commenced legal action against SaskPower for wrongful dismissal, malicious prosecution and breach of privacy. Through that legal action there has been an exchange of documents, questioning and responses to numerous undertakings.

[14] Evidence of previous requests is relevant to the determination of whether the current requests are repetitious or systematic (AB IPC Disregard F2019-RTD-01 at p. 9).

Therefore, I will take into consideration all of the Applicant's previous requests when making this decision.

[15] SaskPower provided my office with a historical breakdown of the 10 requests and responses to the Applicant. The following is a summary of SaskPower's assertions:

- For #1 in the Applicant's October 16, 2020 access to information request, it is repetitious because the records were already disclosed to the Applicant in the Applicant's legal action against SaskPower;
- For #2 in the Applicant's October 16, 2020 access to information request, it is repetitious because the same records were covered in the May 17, 2017 request;
- For #3 in the Applicant's October 16, 2020 access to information request, it is repetitious because the records were already addressed in the request of May 17, 2017, later reviewed by the IPC in Review Report 139-2017 and further appealed by the Applicant to the Court of Queen's Bench which issued its decision in QB 394 of 2017;
- For #4 of the Applicant's October 16, 2020 access to information request, it is repetitious because in response to the Applicant's request on July 4, 2016, SaskPower provided the Applicant with a user activity report, including e-mails the Applicant may have considered "private";
- The first access to information request was on April 7, 2015. The request was for all records on the Applicant's "employment file" including discipline records, any correspondence and investigation reports relating to the Applicant's termination, reasons and causes for termination. SaskPower released 583 pages of records in response to this request;
- SaskPower has released 807 pages of records to the Applicant in response to the Applicant's previous nine access to information requests and waived the costs of doing so;
- The Applicant has previously brought other repetitious requests:
    - In a request received by SaskPower on August 8, 2015, SaskPower had to respond to the Applicant indicating that the information requested was previously requested under the request of April 7, 2015; and
    - In a request received by SaskPower on January 19, 2018, SaskPower had to respond to the Applicant indicating that the records had already been provided to the Applicant following a request made on May 17, 2017.

[16] The Applicant received a copy of SaskPower's application to disregard. In response to SaskPower's assertions, the Applicant made a number of arguments to my office, some of which can be summarized as follows:

- SaskPower did not specify which section of FOIP it was relying on for the application to disregard and did not provide the Applicant with evidence, facts, and arguments to substantiate its position;
- SaskPower accusing the Applicant of a terrorist act is not trivial or frivolous. This has impacted the Applicant's reputation in the community;
- Requesting the records of the accusations that SaskPower provided to the Regina Police Service that was withheld based on an active and ongoing investigation in 2017 is not repetitious and does not amount to an abuse of the right of access;
- SaskPower has the records in its possession which means the Applicant has a right to those records subject to section 5 of FOIP;
- The Applicant is now asking for the same documents that were previously withheld and redacted due to an ongoing police investigation because the investigation is now completed and closed. SaskPower has the records as they were provided to the IPC for Review Report 139-2017;
- In IPC Review Report 242-2017 at paragraph [16], it states that government institutions must respond to access to information requests pursuant to subsection 7(1) of FOIP and that FOIP does not prevent an individual from requesting the same information from a government institution; and
- The Applicant asserted that he is not requesting the same records nor is the access request repetitious. He is simply asking for the records that were previously withheld and redacted due to an ongoing investigation in 2017.

[17] I wish to address a few arguments put forward by the Applicant for clarification sake. The Applicant asserted that SaskPower did not specify which section of FOIP it was relying on and did not provide the Applicant with any evidence, facts, and arguments to substantiate its position. However, SaskPower copied both the Applicant and my office when it submitted its application to disregard to my office. As such, my office and the Applicant received the same information, evidence, facts and arguments. SaskPower clearly indicated in its application that it was relying on subsections 45.1(2)(b) and (c) of FOIP at paragraph 2 of Part 1 of its application.

[18] The facts involving a terrorist act, whether false or accurate, are a criminal matter that does not factor into my decision.

[19] Section 5 of FOIP does provide applicants the right of access to records and information in the possession or control of a government institution. However, those records may be subject to exemptions provided for at Part III of FOIP and/or the personal information provision at subsection 29(1) of FOIP. Section 5 does not provide unlimited access to the records requested, it simply provides the right to request them.

[20] The Applicant has acknowledged that he is requesting records that were already subject to a review by my office and an appeal to the Court of Queen's Bench for Saskatchewan. It appears the Court of Queen's Bench for Saskatchewan determined the records should not be released. If the Applicant was not satisfied with this decision, the next step was to appeal to the Saskatchewan Court of Appeal. It appears instead that the Applicant is requesting the records again from SaskPower.

[21] *Repetition* is the act of repeating an act or thing. To 'repeat' an act or thing, in turn, is to do the act or thing over again one or more times. Requests which repeat a previous request to which SaskPower has already responded are obviously repetitious. However, requests that are considered sufficiently connected can also be found to be repetitious (BC IPC Decision F05-01 at [17]).

[22] I find repetition in the October 16, 2020 access to information request. As such, the access to information request meets the standard of "repetitious" as required by subsection 45.1(2)(b) of FOIP. This is based on the following factors:

- The Applicant is asking more than once for the same records or information; and
- The request is similar in nature and overlaps with several other requests the Applicant has already made.

2. Do the repetitious or systematic requests amount to an abuse of the right of access?

[23] An *abuse of the right of access* is where an applicant is using the access provisions of FOIP in a way that is contrary to its principles and objects.

[24] Once it is determined that the requests are repetitious or systematic, one must consider whether there is a pattern or type of conduct that amounts to an abuse of the right of access or are made for a purpose other than to obtain access to information.

[25] A *pattern of conduct* requires recurring incidents of related or similar requests on the part of an applicant. The time over which the behavior occurs is also a relevant consideration (Ontario Information and Privacy Commissioner (ON IPC) Order M-850 at p. 4).

[26] Factors that can be considered when determining if requests are an abuse of the right of access are as follows:

- *Number of requests:* is the number excessive by reasonable standards?
- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the applicant's aim to harass the government institution or to break or burden the system?
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding?
- *Wording of the request*: are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations?

  (Ontario Information and Privacy Commissioner Order MO-3108 at [24], Alberta Information and Privacy Commissioner Order F2015-16 at [39] and [54])

[27] Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that an applicant's requests are an abuse of the right of access.

[28] Subsection 45.1(2) of FOIP serves to ensure the proper functioning of the Act. I will not give this authorization lightly but nor will the subsection be so narrowly interpreted as to make it meaningless. In *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC), Coultas J. explained the purpose of a similar section in British Columbia's *Freedom of Information and Protection of Privacy Act*. The court explained that the section providing the power to authorize a public body to disregard access requests was an important remedial tool to curb abuse of the right of access. The section and the rest of the Act should be construed by examining it in its entire context bearing in mind the purpose of the legislation. The section is an important part of a comprehensive scheme of access and privacy rights and should not be interpreted into insignificance. The legislative purpose of public accountability and openness are not a warrant to restrict the meaning of the section. The section must be given the remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects. I adopt the same approach to interpreting subsection 45.1(2) of FOIP.

[29] In this case, there are recurring incidents of related or similar requests on the part of the Applicant. This includes repetition in the October 16, 2020 access to information request. The nature and scope of the request is similar to previous requests. This constitutes a pattern or type of conduct that amounts to an abuse of the right of access.

[30] As both parts of the test have been met, I am satisfied that the requirements for subsection 45.1(2)(b) of FOIP have been met.

III DECISION

[31] I grant SaskPower's application to disregard the Applicant's access to information request made by the Applicant on October 16, 2020.

Dated at Regina, in the Province of Saskatchewan, this 9th day of November, 2020.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy Commissioner