



Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 034-2018

Saskatchewan Power Corporation

March 7, 2019

Summary:

Saskatchewan Power Corporation (SaskPower) uses employee photographs in its employee directory. Prior to making employee photographs available on its employee directory, SaskPower seeks the consent of employees through its Image Release form. The Information and Privacy Commissioner (IPC) made a number of findings including one that the Image Release form was overly broad. The IPC made a number of recommendations, including that if the purpose of the Image Release form is to obtain the consent of employees and contractors to use their photographs in the employee directory, then the form should state only that purpose.

I BACKGROUND

[1] An individual provided my office with a portion of Saskatchewan Power Corporation's (SaskPower) Image Release form and expressed concern over the breadth of the wording of the consent form. An image of what was provided to my office is below:

I, [REDACTED] hereby consent to and authorize the use and reproduction by SaskPower, or anyone authorized by SaskPower, of any and all images, photographs, video recordings and/or voice recordings which have been or which may be taken of me or my property, at any SaskPower location or at any time and location where I am acting in my capacity as a contractor of SaskPower (the "Images"). I agree that this consent is irrevocable except as expressly provided herein.

SaskPower shall have the sole property and copyright in all Images and in any reproductions and negatives thereof, whether in digital format or in any other media. SaskPower shall have the right to use or dispose of the Images, without compensation or further notice to me, for use in SaskPower promotional materials; posting on SaskPower internal and external websites (such as saskpower.com, the SaskPower Employee Information Network, and similar sites); use in presentations to SaskPower staff and stakeholders; use in photo validation system for internal corporate identification purposes by the President, Vice-Presidents, Directors, Managers, and security guards; and similar related purposes. SaskPower may use the Images for such purposes in any manner whatsoever, including but not limited to the right to reproduce, distribute to third parties, publish, edit, adapt, dub my voice, reproduce my likeness, and combine such Images of me with other images or recordings, including titling or wording in conjunction therewith, as SaskPower sees fit.

I agree that this release is for an unlimited time and that it shall continue in effect until such time as I explicitly withdraw it by written notice to SaskPower, or at such time as I cease to be a contractor of SaskPower. Any Images taken prior to the termination of this release shall continue to be the property of SaskPower after such termination, and SaskPower shall have the continuing and unrestricted right of use and disposition, as stated herein, of such Images.

[2] On February 26, 2018, my office initiated an investigation. My office requested from SaskPower the following:

- information about the portion of the Image Release form, including if it is a part of a larger form,
- the context in which the form is used,
- if there is a process in place for individuals to raise concerns with SaskPower's Privacy Officer, and
- if the form meet the requirements of section 18 of *The Freedom of Information and Protection of Privacy Regulations*, or if applicable, section 6 of *The Health Information Protection Act*.

[3] In the course of this investigation, SaskPower provided my office with the full consent form. The form features an introductory paragraph that explains SaskPower would like to add employees' photographs to its employee directory. Its full consent form provides as follows:

Home > HR & Employee Services > SaskPower Image Release Form Tuesday, February 27, 2018

SASKPOWER IMAGE RELEASE FORM ADD TO MYLINES

Form Introduction/Instructions
We would like to add your picture to the Employee Directory on the EIH. Please read the image release form below and then make your selection. A confirmation email will be sent to your SaskPower email address once the form has been submitted detailing your selection. If you want to withdraw your support in the future, you can complete an ASK request.

SaskPower Image Release

I, [REDACTED], Contractor, of REGINA SK, hereby consent to and authorize the use and reproduction by SaskPower, or anyone authorized by SaskPower, of any and all images, photographs, video recordings and/or voice recordings which have been or which may be taken of me or my property, at any SaskPower location or at any time and location where I am acting in my capacity as a contractor of SaskPower (the "Images"). I agree that this consent is irrevocable except as expressly provided herein.

SaskPower shall have the sole property and copyright in all Images and in any reproductions and negatives thereof, whether in digital format or in any other media. SaskPower shall have the right to use or dispose of the Images, without compensation or further notice to me, for use in SaskPower promotional materials; posting on SaskPower internal and external websites (such as saskpower.com, the SaskPower Employee Information Network, and similar sites); use in presentations to SaskPower staff and stakeholders; use in photo validation system for internal corporate identification purposes by the President, Vice-Presidents, Directors, Managers, and security guards; and similar related purposes. SaskPower may use the Images for such purposes in any manner whatsoever, including but not limited to the right to reproduce, distribute to third parties, publish, edit, adapt, dub my voice, reproduce my likeness, and combine such Images of me with other Images or recordings, including titling or wording in conjunction therewith, as SaskPower sees fit.

I agree that this release is for an unlimited time and that it shall continue in effect until such time as I explicitly withdraw it by written notice to SaskPower, or at such time as I cease to be a contractor of SaskPower. Any Images taken prior to the termination of this release shall continue to be the property of SaskPower after such termination, and SaskPower shall have the continuing and unrestricted right of use and disposition, as stated herein, of such Images.

Do you agree? YES NO

Pursuant to the provisions of The Electronic Information and Documents Act, 2000, your image release selection by use of this electronic form is of the same force and effect as if done by direction in writing.

I have read and accepted the terms outlined above.
Date: February 21, 2018

[4] Also in the course of this investigation, it revised its consent form by adding an extra paragraph that provides the contact information for SaskPower Chief Privacy Officer, which is shown below:

SASKPOWER IMAGE RELEASE FORM

PRINT | ADD TO MYLINKS

Form Introduction/Instructions

We would like to add your picture to the Employee Directory on the EIN. Please read the image release form below and then make your selection. A confirmation email will be sent to your SaskPower email address once the form has been submitted detailing your selection. If you want to withdraw your support in the future, you can complete an ASR request.

SaskPower Image Release

I, [REDACTED], Contractor, of REGINA SK, hereby consent to and authorize the use and reproduction by SaskPower, or anyone authorized by SaskPower, of any and all images, photographs, video recordings and/or voice recordings which have been or which may be taken of me or my property, at any SaskPower location or at any time and location where I am acting in my capacity as a contractor of SaskPower (the "Images"). I agree that this consent is irrevocable except as expressly provided herein.

SaskPower shall have the sole property and copyright in all Images and in any reproductions and negatives thereof, whether in digital format or in any other media. SaskPower shall have the right to use or dispose of the Images, without compensation or further notice to me, for use in SaskPower promotional materials; posting on SaskPower internal and external websites (such as saskpower.com, the SaskPower Employee Information Network, and similar sites); use in presentations to SaskPower staff and stakeholders; use in photo validation system for internal corporate identification purposes by the President, Vice-Presidents, Directors, Managers, and security guards; and similar related purposes. SaskPower may use the Images for such purposes in any manner whatsoever, including but not limited to the right to reproduce, distribute to third parties, publish, edit, adapt, dub my voice, reproduce my likeness, and combine such Images of me with other images or recordings, including titling or wording in conjunction therewith, as SaskPower sees fit.

I agree that this release is for an unlimited time and that it shall continue in effect until such time as I explicitly withdraw it by written notice to SaskPower, or at such time as I cease to be a contractor of SaskPower. Any Images taken prior to the termination of this release shall continue to be the property of SaskPower after such termination, and SaskPower shall have the continuing and unrestricted right of use and disposition, as stated herein, of such Images.

SaskPower's use of the Images is governed by the provisions of The Freedom of Information and Protection of Privacy Act. If you have any questions about this, please contact SaskPower's Chief Privacy Officer by email at: privacy@saskpower.com

Do you agree? YES NO

Pursuant to the provisions of *The Electronic Information and Documents Act, 2000*, your image release selection by use of this electronic form is of the same force and effect as if done by direction in writing.

I have read and accepted the terms outlined above.
Date: April 19, 2018

II DISCUSSION OF THE ISSUES

1. Do I have jurisdiction pursuant to subsection 33(d) of FOIP to investigate this matter?

[5] Subsection 33(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP) provides my office with the ability to carry out investigation with respect to personal information in the possession or under the control of government institutions. It provides:

33 The commissioner may:

...

(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.

[6] First, SaskPower is a “government institution” as defined by subsection 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[7] Second, an employee directory would contain the name of the employee. An employee’s photograph, depicting the image of an employee, alongside his or her name, would qualify as “personal information” as defined by subsection 24(1) of FOIP, which provides:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual;

[8] I find that the photographs of employees qualify as personal information as defined by subsection 24(1) of FOIP.

[9] Third, since SaskPower maintains its employee directory, I find that it has possession or control over the photographs of employees.

[10] Based on the above, I find that I have jurisdiction pursuant to subsection 33(d) of FOIP to investigate this matter.

2. Does SaskPower require consent to use employee photographs in its employee directory, or does FOIP authorize the use of employee photographs without consent?

[11] At issue is whether FOIP authorizes SaskPower to use employee photographs in the employee directory. SaskPower asserted to my office that FOIP authorizes it to use the employee photograph for its employee directory without obtaining consent.

[12] Subsection 28(a) provides that a government institution can use personal information without consent when the personal information is used for the purpose for which the information was obtained or compiled. Subsection 28(a) provides as follows:

28 No government institution shall use personal information under its control without the consent, given in the prescribed manner, of the individual to whom the information relates, except:

(a) for the purpose for which the information was obtained or compiled, or for a use that is consistent with that purpose; or

[13] In its letter dated April 20, 2018 to my office, SaskPower explained that the original purpose for collecting employees and contractors' photographs was for a photo identification (ID) badge that enabled employees and contractors to have access to SaskPower facilities. Therefore, using the employee photographs for the employee directory would be for a secondary purpose. Subsection 28(b) of FOIP provides that government institutions can use personal information for a purpose for which the information may be disclosed to the government institution pursuant to subsection 29(2) of FOIP. Subsection 28(b) of FOIP provides:

28 No government institution shall use personal information under its control without the consent, given in the prescribed manner, of the individual to whom the information relates, except:

...
(b) for a purpose for which the information may be disclosed to the government institution pursuant to subsection 29(2).

[14] SaskPower asserted that subsection 28(b) of FOIP authorizes it to use employee photographs for the employee directory without obtaining consent. SaskPower explained that using the photographs from the ID badge in the employee directory was to improve the directory system and enable people to easily learn the names of co-workers with a hope that increased collaboration and efficiency would follow. It asserted that subsection 29(2)(1) of FOIP as the purpose for which the information may be disclosed. Subsection 29(2)(1) of FOIP provides:

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

...

(1) for the purpose of:

- (i) management;
- (ii) audit; or
- (iii) administration of personnel;

of the Government of Saskatchewan or one or more government institutions;

[15] Based on subsection 29(2)(1) of FOIP, I need to define the terms “management of personnel”, “audit of personnel”, and the “administration of personnel”. Investigation Report 2001-IR-006 by Alberta’s Office of the Information and Privacy Commissioner (AB IPC) defines the “management of personnel” and the “administration of personnel”. Service Alberta summarized the two definitions in its *FOIP Guidelines and Practices* as follows:

Management of personnel refers to aspects of the management of human resources of a public body that relate to the duties and responsibilities of employees (see IPC Investigation Report 2001-IR-006). This includes staffing requirements, job classification or compensation, recruitment and selection, salary, benefits, hours and conditions of work, leave management, performance review, training and development, occupational health and safety, and separation and layoff. For the Government of Alberta, the term includes the government-wide network managed through the Corporate Human Resources. It does not, however, include the management of consultant, professional or independent contractor contracts.

Administration of personnel comprises all aspects of a public body’s internal management, other than personnel management, necessary to support the delivery of programs and services. Administration includes business planning, financial, materiel, contracts, property, information, and risk management (see IPC Investigation Report 2001-IR-006).

[16] Further, my office's Review Report F-2010-001 defined "audit" as a systematic identification, evaluation, and assessment of an organization's policies, procedures, acts, and practices against pre-defined standards. Based on this definition of the term "audit", the audit of personnel would be a systematic identification, evaluation, and assessment of an organization's policies, procedures, acts, and practices as they relate to personnel.

[17] Based on the above definitions, using employees' and contractors' photographs in the employee directory for the purpose of improving functionality and enabling people to easily learn the names of co-workers, with a hope of increasing collaboration and efficiency is not the management, audit, or administration of personnel. Therefore, I find that subsection 28(b) and 29(2)(1) of FOIP do not authorize the use of the photographs in the employee directory without consent.

[18] I find that SaskPower must rely on employees' and contractors' consent in order to use their photographs in the employee directory.

3. Does SaskPower's consent form meet the requirements of section 18 of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations)?

[19] Section 18 of the FOIP Regulations provides as follows:

18(1) If consent is required by the Act for the collection, use or disclosure of personal information, the consent:

- (a) must relate to the purpose for which the information is required;
- (b) must be informed;
- (c) must be given voluntarily; and
- (d) must not be obtained through misrepresentation, fraud or coercion.

[20] Below is an analysis of each of the four elements:

a. Must relate to the purpose for which the information is required

[21] The consent should specify the purpose for which the information is required.

[22] SaskPower's letter dated April 20, 2018 to my office specifies that the consent is to use employees' and contractors' photographs in the employee directory. However, when I review SaskPower's revised Image Release form, it specifies several purposes, including using employees' or contractors' photographs:

- i. in the employee directory,
- ii. SaskPower promotional materials,
- iii. posting on SaskPower's internal and external websites,
- iv. in presentations to SaskPower staff and stakeholders,
- v. in its photo validation system for internal corporate identification purposes by the President, Vice-Presidents, Directors, Managers, and security guards.

[23] The revised Image Release form also provides that SaskPower may use the employee photographs for

such purposes in any manner whatsoever, including but not limited to the right to reproduce, distribute to third parties, publish, edit, adapt, dub my voice, reproduce my likeness, and combine such Images of me with other images or recordings, including titling or wording in conjunction therewith, as SaskPower sees fit.

[24] I find that the purposes stated in SaskPower's revised Image Release form to be overly broad. If the purpose of the Image Release form is to obtain the consent of employees and contractors to use their photographs in the employee directory, then the consent form should state only that. For example, it is unnecessary to dub an employee's voice in order to use the photograph for the employee directory. If SaskPower wants to use employees' and contractors' photographs for purposes beyond the employee directory, then I recommend that it determine if it has authority under FOIP to do so or if it needs to seek consent. If it needs consent, then it should prepare consent forms for the other purposes.

b. Must be informed

[25] Consent is informed consent when the individual understands:

- The specific information to be collected, used, or disclosed,
- The anticipated uses and/or disclosures of personal information,
- To whom the personal information may be disclosed,

- The date the consent is effective and the date on which the consent expires, and
- Any potential risks associated with the collection, use or disclosure.

[26] Based on a review of the revised SaskPower Image Release form, I find that the form does not include the date in which the consent expires. In its submission, SaskPower states that the consent is time limited in that the consent “automatically would cease when the individual ceases being either an employee or a contractor; and it may be withdrawn by the data subject upon written notice”. However, the form provides that:

any images taken prior to the termination of this release shall continue to be the property of SaskPower after such termination, and SaskPower shall have the continuing and unrestricted right of use and disposition, as stated herein, of such Images.

[27] SaskPower should make every effort to stop using the employee or contractor’s image once the employee or contractor revokes his or her consent. In other words, SaskPower should not have “continuing and unrestricted right of use and disposition” of the employee or contractor’s image once the consent is revoked. Instead, I recommend that the form provide that revocation of consent would involve SaskPower not using the image in any future employee directory.

c. Must be given voluntarily

[28] In its letter dated April 20, 2018, SaskPower asserts that consent is voluntary. I note that on the bottom of the SaskPower Image Release form, employees and contractors are asked if they agree with the SaskPower Image Release, and they are able to check “yes” or “no”. Therefore, I find that the consent is voluntary.

d. Must not be obtained through misrepresentation, fraud or coercion

[29] In its letter dated April 20, 2018, SaskPower asserts that the consent is not obtained through misrepresentation, fraud or coercion. Based on a review of the SaskPower Image Release form, there is nothing to suggest that SaskPower is obtaining consent through misrepresentation, fraud or coercion.

III FINDINGS

- [30] I find that I have jurisdiction to investigate pursuant to subsection 33(d) of FOIP.
- [31] I find that the photographs of employees qualify as personal information as defined by subsection 24(1) of FOIP.
- [32] I find that subsection 28(b) and 29(2)(1) of FOIP does not authorize the use of the photographs in the employee directory without consent.
- [33] I find that SaskPower must rely on employees' and contractors' consent in order to use employees' and contractors' photographs in the employee directory.
- [34] I find that the purposes stated in SaskPower's revised Image Release form to be overly broad.
- [35] I find that the revised Image Release form does not contain the elements to be an informed consent.
- [36] I find that the consent is voluntary.

IV RECOMMENDATIONS

- [37] I recommend that if the purpose of the Image Release form is to obtain the consent of employees and contractors to use their photographs in the employee directory, then the consent form should state only that purpose. I recommend that SaskPower implement this recommendation on a go-forward basis. This means that new hires and as current employees are required to renew their photograph should receive an opportunity to review and fill out the revised consent form.

[38] If SaskPower wants to use employees' and contractors' photographs for purposes beyond the employee directory, then I recommend that it determine if it has authority under FOIP to do so or if it needs to seek consent before proceeding. If it needs consent, then it should prepare consent forms for the other purposes.

[39] I recommend that the Image Release form provide that revocation of consent does not have retroactive effect but that SaskPower will not use and/or disclose the employee or contractor's image any further.

Dated at Regina, in the Province of Saskatchewan, this 7th day of March, 2019.

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