



## INVESTIGATION REPORT 120-2016

### SaskPower

July 11, 2016

**Summary:** SaskPower collected an employee's personal information by conducting a forensic investigation on the employee's work computer. The now former employee alleged that SaskPower breached his privacy by collecting his personal information from his workstation. The Office of the Information and Privacy Commissioner found that while employees have a reasonable expectation of privacy in the workplace, section 25 authorized SaskPower to collect the former employee's personal information.

### I BACKGROUND

- [1] SaskPower sent a letter dated March 31, 2015 to the Complainant that informed him that his employment had been terminated.
- [2] In a letter dated July 20, 2015, the Complainant wrote to SaskPower about how he learned through a document from the Ministry of Labour Relations and Workplace Safety that SaskPower had "surreptitiously" collected his personal information without his consent or authorization. He also asserted that he found "the scope and breadth of this collection" to be "particularly disturbing".
- [3] SaskPower responded to the Complainant in a letter dated August 10, 2015, stating that it was "enforcing our legal rights and engaging in the management, audit or administration of personnel". It also provided a screenshot of the System Access Agreement that appears on employees' screens prior to employees logging into their local area network accounts to counter the Complainant's claim that the collection of personal information was done

in secret or that he had any expectation of privacy when using SaskPower's Information Technology assets. The System Access Agreement states the following:

This computer system including all related equipment is provided only for authorized use, by authorized users. Continuation beyond this logon is acknowledgement that you understand the policy and consent to abide by all terms of the policy. Users have NO expectation of privacy on this system, or any other related equipment, networked device or storage. Unauthorized use of the system is prohibited and may be subject to disciplinary, civil and/or criminal penalties which may include referral to law enforcement. By using this system and any related equipment, you are deemed to consent to being monitored, and to abide by all SaskPower policies and standards.

[4] The Complainant was dissatisfied with SaskPower's response to his privacy concerns. Therefore, he sent a letter dated May 30, 2016 requesting that my office investigate the matter.

[5] On June 3, 2016, my office notified both the Complainant and SaskPower that it would be undertaking an investigation.

## **II DISCUSSION OF THE ISSUES**

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

### **1. Does the information at issue qualify as personal information under FOIP?**

[7] Subsection 24(1) of FOIP defines "personal information" as follows:

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

[8] The information at issue is about the Complainant's non-work related activities during hours for which he was being paid by SaskPower. I find that the information qualifies as "personal information" as defined by subsection 24(1) of FOIP.

**2. Did SaskPower have authority under FOIP to collect the personal information?**

[9] Section 25 of FOIP authorizes government institutions to collect personal information for a purpose that relates to an existing or proposed program or activity of the government institution. It provides:

25 No government institution shall collect personal information unless the information is collected for a purpose that relates to an existing or proposed program or activity of the government institution.

[10] Information regarding whether the Complainant was conducting non-work related activities during hours for which he was being paid is information which is directly related to SaskPower's management of human resources. Further, information regarding whether the Complainant may have violated SaskPower's policies and standards is directly related to SaskPower's management of human resources. Managing human resources is a legitimate activity of SaskPower. As such, I find that section 25 of FOIP authorizes SaskPower to collect the Complainant's personal information for the purpose of managing human resources.

**3. Did SaskPower directly collect the personal information in accordance with section 26 of FOIP?**

[11] When government institutions are collecting personal information directly from individuals, they are to provide notification of the purpose prior to, or at the time of, the collection of personal information, pursuant to subsection 26(2) of FOIP. Notification is not required if the collection is indirect and the indirect collection is authorized by subsection 26(1) of FOIP. Therefore, I must determine if SaskPower directly or indirectly collected the personal information from the Complainant.

[12] In its submission dated June 17, 2016, SaskPower cites subsection 26(1)(f) as its authority for the indirect collection of personal information. Indirect collection of personal information is when personal information about an individual is collected from another source. However, in this case, I find that the personal information came from the Complainant himself, and not from another source. Order F07-18 by the Office of the

Information and Privacy Commissioner for British Columbia (BC OIPC) states that information is directly collected from an individual when the information is a result of the individual's own activities. Information is indirectly collected when the source of the information is from a source other than the individual. Therefore, I find that SaskPower collected personal information directly from the Complainant. The personal information was collected as a result of the Complainant's own activities. Therefore, SaskPower must provide notification for the collection of personal information.

**4. Did SaskPower give appropriate notice pursuant to subsection 26(2) of FOIP?**

[13] Subsection 26(2) of FOIP requires that government institutions are to inform an individual of the purpose of the collection when they are collecting personal information directly. It provides:

26(2) A government institution that collects personal information that is required by subsection (1) to be collected directly from an individual shall inform the individual of the purpose for which the information is collected unless the information is exempted by the regulations from the application of this subsection.

[14] As noted earlier in the background section, SaskPower employees are shown a System Access Agreement prior to logging onto their local area network accounts. It states:

This computer system including all related equipment is provided only for authorized use, by authorized users. Continuation beyond this logon is acknowledgement that you understand the policy and consent to abide by all terms of the policy. Users have NO expectation of privacy on this system, or any other related equipment, networked device or storage. Unauthorized use of the system is prohibited and may be subject to disciplinary, civil and/or criminal penalties which may include referral to law enforcement. By using this system and any related equipment, you are deemed to consent to being monitored, and to abide by all SaskPower policies and standards.

[15] Based on the System Access Agreement, one could understand that the collection of personal information through monitoring would be to ensure compliance with SaskPower policies and standards. However, I disagree that users have no expectation of privacy. This matter about employees' expectation of privacy will be dealt with below. For now, I will only consider whether the System Access Agreement meets the requirements of subsection 26(2) of FOIP. Since the System Access Agreement states that the purpose for

monitoring usage is to ensure employees abide by all SaskPower policies and standards, I find that it meets the requirements of subsection 26(2) of FOIP.

**a. Do employees have a right to privacy in the workplace?**

[16] As mentioned earlier, SaskPower's System Access Agreement states that users have no expectation of privacy. I disagree with this statement. Government institution employees, including SaskPower employees have privacy rights under FOIP. Therefore, I find that SaskPower's System Access Agreement to be inaccurate. I recommend that SaskPower revise its System Access Agreement as follows:

- remove the statement that users have no expectation of privacy,
- insert a statement that the use of the system may be monitored if SaskPower believes on reasonable grounds that a user is violating SaskPower policies and standards,
- insert a statement that any collection, use, and/or disclosure of personal information would be done in compliance with FOIP, and
- insert a statement that users may contact SaskPower's Privacy Officer if they have any questions regarding the collection, use, and/or disclosure of their personal information. SaskPower's Privacy Officer's name and contact information should be included.

[17] In an email dated July 8, 2016, SaskPower indicated to my office that it accepts my recommendation and forwarded a working draft of an updated System Access Agreement.

**5. Did SaskPower violate the Complainant's reasonable expectation of privacy?**

[18] The Complainant alleges that SaskPower "indiscriminately" collected his personal information. He argues that employees have a reasonable expectation of privacy. To support his argument, he provided my office with a copy of SaskPower's Enterprise Security Policy that states "SaskPower permits the occasional use of IT Assets for personal reasons". He also referenced the Supreme Court decision *R. v. Cole, 2012 SCC*

53, [2012] 3 S.C.R. 34 to support his argument that employees can reasonably expect privacy on workplace computers when personal use is permitted or reasonably expected.

[19] In *R. v. Cole*, the Supreme Court of Canada concluded that while workplace policies and practices may diminish an individual's expectation of privacy in a work computer, the operational realities do not remove the expectation entirely. Any intrusion upon a reasonable expectation of privacy must only be under the authority of a reasonable law.

[20] The Supreme Court of Canada found that the school board had lawful authority to seize and search a high school teacher's school board-issued laptop if the principle believed on reasonable grounds that the hard drive contained compromising photographs of a student. The principal had a statutory duty to maintain a safe school environment. However, the school board's lawful authority did not authorize the police to conduct a warrantless search of the work laptop. As such, it was the police, and not the school board, who infringed upon the high school teacher's rights under section 8 of the *Charter of Rights and Freedoms*.

[21] I agree with the Complainant, though, that employees have a reasonable expectation of privacy in the workplace. An employer gathering information regarding how an employee uses his or her work computer can be highly intrusive. It should not necessarily be the first or only method that an employer uses in managing employees. Employers must attempt to use lesser intrusive methods to manage its human resources before resorting to conducting a forensic investigation into an employee's work computer. Also, they must have a reasonable basis for believing that an employee's use of IT assets may be non-compliant with workplace policies and standards prior to initiating a forensic investigation into an employee's work computer.

[22] Based on a letter dated April 24, 2015 from SaskPower to the Complainant, I note that SaskPower attempted to use lesser intrusive methods of managing the employment relationship with the Complainant. This included a meeting between a SaskPower Manager and the Complainant in September 2013. In that meeting, SaskPower had discussed with the Complainant how his conduct was contravening SaskPower's Code of

Conduct. SaskPower had also sent a reminder to the Complainant in October 2013 about how his conduct was contravening SaskPower's Code of Conduct.

[23] Employees' reasonable expectation of privacy does not mean that SaskPower cannot, under any circumstance, collect information about how its employees are using SaskPower's IT assets. SaskPower must only collect personal information as authorized by FOIP. As found earlier, section 25 of FOIP authorized SaskPower to collect the Complainant's personal information for the purpose of managing human resources. Examples of the type of information that SaskPower is authorized by section 25 of FOIP to collect is information regarding whether the Complainant was conducting non-work activities during hours for which he was being paid, information that shows the Complainant was engaging in activities that may be violating SaskPower policies and standards, information that shows that the Complainant was non-compliant with any agreements made between SaskPower and the Complainant would be directly related to SaskPower's management of human resources.

[24] However, any information which reveals specific information on non-work related activities is not directly related to SaskPower's management of human resources. Therefore, section 25 would not authorize the collection of such specific information. Examples of such information would include the Complainant's personal banking transactions. Such information would not be necessary for managing human resources.

[25] SaskPower provided my office with the final report of the forensic investigation. The Complainant received a redacted copy of this final report as a result of my office's Review Report 145-2015. This final report summarizes documentary evidence that SaskPower collected. SaskPower also provided my office with a copy of the documentary evidence. I find that both the final report and the documentary evidence contains information that section 25 of FOIP authorizes SaskPower to collect to manage its human resources – namely, the employment relationship with the Complainant.

[26] I should also note that the documentary evidence does not contain specific information about non-work related activities. Specifically, I did not find any information regarding the Complainant's banking transactions.

[27] Based on the above, I do not find that SaskPower violated the Complainant's reasonable expectation of privacy.

**a. Did SaskPower "indiscriminately" collect personal information?**

[28] In his letter dated June 1, 2016 to my office, the Complainant alleged that SaskPower "indiscriminately" collected his personal information. He also alleged that SaskPower "monitors all activities on all of its computers that are assigned to employees and collects and retains such information" and misleads employees "into believing personal use of [the] computer is permitted".

[29] Based on the evidence provided to me by SaskPower, I disagree that SaskPower "indiscriminately" collects employees' personal information by monitoring all activities on computers assigned to employees. The forensic investigation conducted by SaskPower was focused on the Complainant's activities only. This forensic investigation was initiated by the Senior Director, Human Resources, and was conducted because of the Complainant's failure to maintain a reasonable standard of work performance and productivity. Further, the scope of the forensic investigation was to be focused on the Complainant's workstation, internet/network activity, and SaskPower email activity, according to the Executive Summary of the final report. There is no evidence to suggest that SaskPower monitors all activities on all of its computers that are assigned to its employees.

[30] I find that SaskPower did not indiscriminately collect personal information. It had a reasonable basis to believe the Complainant was conducting non-work related activities during work hours. It was upon that basis that it conducted a focused investigation into the Complainant's activities.

**IV FINDINGS**

[31] I find that the information at issue qualifies as "personal information" as defined by subsection 24(1) of FOIP.



- [32] I find that section 25 of FOIP authorizes SaskPower to collect the Complainant's personal information for the purpose of managing human resources.
- [33] I find that SaskPower collected personal information directly from the Complainant.
- [34] I find that it meets the requirements of subsection 26(2) of FOIP.
- [35] I do not find that SaskPower violated the Complainant's reasonable expectation of privacy.
- [36] I find that SaskPower had a reasonable basis for conducting a focused investigation into the Complainant's activities.

## **V RECOMMENDATION**

- [37] I recommend that SaskPower follow through with its updating of its System Access Agreement as described in paragraph [17].

Dated at Regina, in the Province of Saskatchewan, this 11th day of July, 2016.

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