



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **INVESTIGATION REPORT 278-2017**

### **Saskatchewan Power Corporation**

**May 2, 2018**

**Summary:**

In September 2013, Saskatchewan Power Corporation (SaskPower) forwarded a briefing note to the Minister Responsible for SaskPower containing details about an access to information request and included the first and last name of the Applicant. In November 2017, the Applicant requested my office undertake a privacy breach investigation. The Commissioner found that while SaskPower may have had authority to disclose personal information to the Minister, it did not consider the need-to-know and data minimization principles. The Commissioner found that since the 2013 breach of privacy incident, SaskPower had changed its practices for handling access to information requests and have adequate safeguards in place to protect the identity of the Applicant.

### **I BACKGROUND**

- [1] A September 2013 briefing note prepared by Saskatchewan Power Corporation (SaskPower) for the Minister Responsible for SaskPower contained details about an access to information request. The briefing note also identified the first and last name of the Applicant. On November 7, 2017, the Applicant emailed my office requesting my office investigate SaskPower's disclosure of their name as the Applicant that submitted the access to information requests discussed in the briefing note.
- [2] On November 8, 2017, my office notified both SaskPower and the affected individual of my intentions to undertake an investigation.

[3] On December 8, 2017, SaskPower provided my office with its response to this privacy breach complaint.

## **II DISCUSSION OF THE ISSUES**

### **1. Does *The Freedom of Information and Protection of Privacy Act (FOIP)* apply in these circumstances?**

[4] FOIP applies to privacy matters when three elements are present; first element is a government institution, second element is personal information and the third element is if the personal information is in the possession or control of the government institution.

[5] SaskPower qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP.

[6] Subsection 24(1) of FOIP provides the definition of personal information. In the September 12, 2013 briefing note, SaskPower identified the Applicant's first and last name, where the Applicant was employed and a list of the three access to information requests submitted by the Applicant in September 2013 regarding a specific topic.

[7] In Review Report LA-2010-002, Review Report LA-2012-002, Review Report 156-2017 & 267-2017, my office found that the name of the Applicant qualified as personal information.

[8] As such, I find that the disclosure of the briefing note involves personal information of the Applicant.

[9] Finally, the briefing note was created by SaskPower regarding the access to information requests submitted to SaskPower by the Applicant. As such, I find that SaskPower has possession and control of the personal information.

[10] I find that FOIP applies in this circumstance.

**2. Did SaskPower have authority to disclose the personal information in question to the Minister?**

[11] When my office notified SaskPower of my intentions to investigate this complaint, SaskPower responded stating:

No internal investigation has taken place. [the Applicant's] complaint that his privacy had been violated was evaluated and it was immediately determined that the [sic] no privacy violation had taken place. The personal information of the complainant was provided to the Minister Responsible for SaskPower. [FOIP] and the Regulations clearly permit the disclosure.

[12] SaskPower stated that it had authority to disclose personal information to the Minister pursuant to subsection 29(2)(u) of FOIP and subsection 16(k) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Subsection 29(2)(u) of FOIP provides that a government institution may disclose personal information as prescribed in the FOIP Regulations. Subsection 16(k) of the FOIP Regulations provides as follows:

**16** For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:

...

(k) by a government institution to the member of the Executive Council who is, from time to time, responsible for that government institution pursuant to *The Executive Government Administration Act*, where that member of the Executive Council is not the head of the government institution;

[13] Subsection 2(1)(e)(ii) of FOIP defines the head of a government institution as:

**2** In this Act:

...

(e) “**head**” means:

...

(ii) in the case of a board, commission, Crown corporation or body mentioned in subclause (d)(ii), the prescribed person;

[14] As noted earlier in this report, SaskPower qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP. Subsection 3(a) of the FOIP Regulations provides:

**3** For the purposes of subclause 2(1)(d)(ii) of the Act:

(a) the bodies set out in Part I of the Appendix;

[15] SaskPower is listed as one of the prescribed bodies in Part I of the Appendix.

[16] Subsection 4(a) of the FOIP Regulations provides the following regarding the prescribed head for a Crown corporation:

**4** For the purposes of subclause 2(1)(e)(ii) of the Act:

(a) the chief executive officers of Crown corporations that are prescribed as government institutions pursuant to clause 3(a) are prescribed as the heads of their respective Crown corporations;

[17] As such, the chief executive officer of SaskPower would be considered as the head of the government institution for the purposes of FOIP.

[18] SaskPower's response to my investigation also quoted subsection 5(5) of *The Power Corporation Act* regarding the Minister's responsibility for SaskPower:

**5(5)** The corporation shall, in the performance of the duties and exercise of the powers imposed or conferred under this Act, be responsible to such member of the Executive Council as may be designated by the Lieutenant Governor in Council.

[19] While subsection 16(k) of the FOIP Regulations provides SaskPower with authority to disclose personal information to the Minister, the government institution still has an obligation to consider the need-to-know and data minimization principles when making the decision to disclose personal information.

[20] The need-to-know and data-minimization principles are defined as follows:

***Need-to-know***: is the principle that public bodies and their staff should only collect, use or disclose personal information unless the information relates to an existing or proposed program or activity of the public body.

***Data minimization***: is the principle that public bodies and their staff should collect, use or disclose the least amount of identifying information necessary for the purpose.

[21] SaskPower's internal investigation report provides the following regarding the consideration of these two principles:

The purposes of the briefing note was to provide information to the Minister on issues surrounding the FOI access requests on a matter that had potential to be controversial. At the time this briefing note was provided, the concepts of data minimization and need to know were not considered relevant in the interactions between SaskPower and its Minister given the existence of a specific exemption in the regulations permitting the disclosure and the Minister's broad responsibility for SaskPower as described in subsection 5(5) of *The Power Corporation Act*.

[22] Just because a provision in FOIP provides a government institution with the authority to disclose personal information, that does not mean SaskPower does not need to take both the need-to-know and data minimization principles into consideration when dealing with personal information. A privacy breach can still occur if there is an over-collection of personal information or if the government institution uses or discloses more personal information than is necessary, or personal information is shared without a legitimate need-to-know.

[23] While the Minister may have had a need-to-know about issues based on the Minister's responsibilities for SaskPower, there is still a requirement to consider what personal information is necessary for this purpose and whether or not that Minister has a need-to-know. So the question is, was it necessary for SaskPower to disclose the name of the Applicant to the Minister and did the Minister have a need-to-know the name of the Applicant.

[24] My office's resource, *Best Practices for Responding to Access Requests* provides the following regarding the identity of the Applicant:

Our view is that a public body should not disclose the identity of the applicant to anyone who does not have a legitimate ‘need to know’. A legitimate need to know relates to the specific knowledge an individual requires in order to process the access request.

For example, if the applicant is making an access request for their own personal information then their identity is clearly relevant when searching for records. On the other hand, if the applicant is requesting access to general information, their identity would almost always be irrelevant, and no one other than FOIP Coordinators would have a need to know their identity.

It is improper to treat applicants differently depending on who they are or what organization they may represent. It would be improper to broadcast the identity of an applicant throughout a public body or to disclose the identity outside of the organization.

[25] As noted earlier in this report, SaskPower had provided in its response to my office that the purpose of the disclosure to the Minister was due to the concern that the release of the information had potential to be controversial. However, it does not appear the Minister had a need-to-know the identity of the Applicant, nor was the identity of the Applicant required in order to notify the Minister about the information that was being released.

[26] I find that SaskPower did not appropriately consider the need-to-know and data minimization principles when the Applicant’s personal information was disclosed to the Minister.

**3. Does SaskPower have appropriate policies or procedures in place to protect the identity of the Applicant?**

[27] SaskPower responded to my office’s request to conduct an investigation into the privacy complaint stating that it is no longer SaskPower’s practice to disclose the name of the Applicant to the Minister’s office. SaskPower advised that while there is no written policies or procedures regarding this practice, there is a directive from the Crown Investment Corporation of Saskatchewan (CIC). SaskPower provided a copy of the directive it was referring to which is in the form of an email from the Senior Vice President and General Council of CIC, dated July 17, 2015, which stated:

As a follow up to our meeting on July 8, I undertook to look into the issue of applicant name disclosure to Ministers' offices. After some consultation, the consistent approach we should take at the Crowns is not to disclose the name of the applicant. It is permissible to give a generic description of the applicant where known i.e. media.

[28] The *Federal Access to Information and Protection of Privacy Legislation Annotated 2017* (the Annotated Legislation, provides the following regarding the protection of the identity of Applicants:

Pursuant to its mandate under Standing Order 108(2), in November 2006 during the First Session of the 30<sup>th</sup> Parliament, the Standing Committee on Access to Information, Privacy and Ethics presented its report concerning the allegations that the name of access to information applications were being disclosed to political staff of the current and previous governments.

The committee noted that the legal protection against the release of requester names lies not in the *Access to Information Act*, but in the *Privacy Act*. It noted also that the name of an access requester is considered personal information for the purpose of the Act, and as such, it cannot, without the consent of the individual, be used or disclosed by the government except for the purpose for which it was obtained or compiled or for a use consistent with that purpose.

Acknowledging that federal institutions tend to classify access requests by the occupation of the requester, ie. media, the Committee recognized that this allows these institutions to treat politically sensitive requests differently, including more slowly and in less forthcoming manner than other requests. Also, there is a risk in some cases that such categorizations may allow officials to guess the actual identities of some requesters. In its report, the Committee recognized therefore that the value of requester anonymity does not lie solely in the protection of requester from potential harm resulting from the release of their names, although many requesters would seek that protection, but also in ensuring impartiality in the processing of access requests.

The Committee concluded by recommending that legislative measures to amend the *Access to Information Act* to specifically address the concern about the practice of categorizing and tracking the identities of access to information requesters within federal institutions so as to protect the identity of all access requesters.

[29] Subsection 24(1) of FOIP provides a non-exhaustive list of information that qualifies as personal information and states that personal information means “personal information about an identifiable individual that is recorded in any form.” The IPC Guide to Exemptions provides a two part test that is to be considered when a public body is determining whether information qualifies as personal information:

1. Is there an identifiable individual?

**Identifiable individual** means that it must be reasonable to expect that an individual may be identified if the information were disclosed. The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.

2. Is the information personal in nature?

**Personal in nature** means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[30] SaskPower is considered both a government institution for purposes of FOIP and a trustee for the purposes of *The Health Information Protection Act* (HIPA). SaskPower has a legislative duty to appropriately safeguard personal health information in its possession or control under section 16 of HIPA. Prior to January 1, 2018, my office's position was that government institutions had an implied duty to establish policies and procedures to protect personal information under FOIP. As of January 1, 2018, the duty has now been enshrined in statute at section 24.1 of FOIP. Subsection 24.1(a) of FOIP provides:

**24.1** Subject to the regulations, a government institution shall establish policies and procedures to maintain administrative, technical and physical safeguards that:

(a) Protect the integrity, accuracy and confidentiality of the personal information in its possession or under its control.

[31] As the disclosure of the Applicant's name had occurred in 2013, my office requested copies of relevant policies and procedures discussing SaskPower's current practice for processing access to information requests and how the identity of the Applicant is protected.

[32] In my office's draft report, it was recommended that SaskPower develop a policy based on the CIC directive to ensure an Applicant's identity is protected. SaskPower responded indicating that it is "required by law to comply with that directive... A SaskPower Corporate policy would not carry any greater weight."



[33] As well, SaskPower advised that its current procedure, which has been in place since the 2015 CIC directive, is as follows:

The wording of the access requests is reproduced verbatim in the email [to the record custodians within the Corporation]. However, any information that would identify the applicant is removed. The identity of the applicant is treated as confidential and is only known to the FOI coordinator, the lawyer acting as the Access Officer, and in circumstances where the applicant has requested access to their personal information, to a small group of individuals tasked with searching for and gathering the responsive records... Once the record custodians have responded and either provided responsive records, or their advice that there are no records responsive to the request, a reply is circulated for approval. Again, no information that would identify the applicant is on the draft reply.

[34] SaskPower also provided my office with sample emails showing the information that is included in each stage of the processing of access to information requests.

[35] A representative from my office also met with SaskPower's FOI Coordinator and FOI Officer to discuss how the identity of an Applicant is protected in the access to information process. SaskPower's FOI team provided my office with a copy of written procedures followed when processing an access to information request. SaskPower also had a binder of reference material related to the access to information process and described training sessions on access to information that is provided to SaskPower executive and staff.

[36] Based on these materials, it appears SaskPower has appropriate procedures and training in place to protect the identity of the Applicant in the access to information process.

### **III FINDINGS**

[37] I find that FOIP applies to this circumstance.

[38] I find that SaskPower did not appropriately consider the need-to-know and data minimization principles when the Applicant's personal information was disclosed to the Minister.

[39] I find that SaskPower has adequate policies and procedures in place to protect the identity of the Applicant in the access to information process.

#### **IV RECOMMENDATION**

[40] I recommend SaskPower take no further action.

Dated at Regina, in the Province of Saskatchewan, this 2nd day of May, 2018.

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