



## **REVIEW REPORT 145-2015**

### **Saskatchewan Power Corporation**

**October 9, 2015**

#### **Summary:**

The Applicant made a request for an investigation report about himself and e-mails about performance reviews. Saskatchewan Power Corporation applied subsections 15(1)(c), (d), (e), 20(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to the Investigation Report and 29(1) of FOIP to portions of the e-mails. The Commissioner found that subsection 20(a) of FOIP applied to portions of the Investigation Report and 29(1) of FOIP applied to one part of the e-mails. He recommended release of the rest of the record.

#### **I BACKGROUND**

[1] On April 7, 2015, the Applicant, a former employee of the Saskatchewan Power Corporation (SaskPower), requested several documents. Part of the request was for the following:

- An Investigation Report prepared by SaskPower that led to the Applicant's termination.
- Redacted portions of an email conversation and calibration session comments.

[2] SaskPower provided the Applicant with a fee estimate for the entire request. After the Applicant requested a fee waiver, SaskPower waived the fees. It provided the Applicant with a response on June 1, 2015. It indicated that the investigation report was being withheld pursuant to subsections 15(1)(c), (d), (e), 20(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). It also indicated the redacted portions of the e-mails are being withheld pursuant to subsection 29(1) of FOIP.

[3] The Applicant requested a review of SaskPower's decision by my office on July, 27, 2015. On August 12, 2015, my office provided notification to both SaskPower and the Applicant of our intention to undertake the review.

## **II RECORDS AT ISSUE**

[4] The investigation report is an 18 page document. It is being withheld in its entirety pursuant to subsections 15(1)(c), (d), (e), 20(a) and (b) of FOIP.

[5] The e-mails consist of seven pages. Four portions are being withheld pursuant to subsection 29(1) of FOIP.

## **III DISCUSSION OF THE ISSUES**

### **1. Did SaskPower properly apply subsection 15(1)(c) of FOIP to the record?**

[6] Subsection 15(1)(c) of FOIP states:

**15(1)** A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[7] In order to qualify for this exemption, the investigation must qualify as a lawful investigation. My office has defined "lawful investigation" as an investigation that is authorized or required and permitted by law. Neither the record nor SaskPower's submission identifies by which law that the investigation was authorized. Therefore, subsection 15(1)(c) does not apply to the record.

**2. Did SaskPower properly apply subsection 15(1)(d) of FOIP to the record?**

[8] Subsection 15(1)(d) of FOIP states:

**15(1)** A head may refuse to give access to a record, the release of which could:

...

(d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings;

[9] In order to for this exemption to apply, the following test must be met:

1. Do the proceedings qualify as legal proceedings for the purposes of FOIP/LA FOIP?
2. Could disclosure of the withheld records be injurious to the public body in the conduct of existing or anticipated legal proceedings?

[10] My office has defined “legal proceedings” as proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.

[11] SaskPower’s submission indicates that it “anticipates that the Applicant will bring a legal proceeding against it for wrongful dismissal.” This would qualify as a legal proceeding.

[12] However, SaskPower’s submission also states:

Disclosure of the Investigation Report is likely to occur once proceedings have been commenced. However, all disclosure made by parties during litigation is subject to a well-known legal principle called “the implied undertaking”. Parties receiving disclosure are forbidden from using them for purposes other than the litigation and are prohibited from disclosing them outside the litigation. They are liable to sanction by contempt of court if they do so.

[13] The injury should be above and beyond any prejudice that relates to the production of a relevant, non-privileged document in the usual course of a lawsuit. Discovery and disclosure provisions of the Rules of the Court of Queen’s Bench of Saskatchewan operate independent of any process under FOIP. Section 4(c) of FOIP establishes that the Act do not limit access to information otherwise available by law to parties to litigation.

Section 4 also establishes that the Act complements and does not replace existing procedures for access to records.

[14] SaskPower had not persuaded me that disclosure would be injurious to anticipated court proceedings. Therefore, subsection 15(1)(d) of FOIP does not apply.

### **3. Did SaskPower properly apply section 20 of FOIP to the record?**

[15] Section 20 of FOIP states:

**20** A head may refuse to give access to a record that contains information relating to:  
(a) testing or auditing procedures or techniques; or  
(b) details of specific tests to be given or audits to be conducted;  
if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[16] In relation to this exemption, tests or audits cover a wide range of activities. The investigation performed by SaskPower would qualify as an audit for the purposes of this section 20 of FOIP.

[17] The techniques or procedures must include specific steps. General information, such as forms and standard policies that do not include specific steps and procedures, would not qualify. Routine, common or customary auditing techniques and procedures would not qualify.

[18] Upon review of the record, there are three portions of the record that would constitute auditing techniques or procedures:

- The first non-bulleted paragraph on page 7 of the Investigation Report;
- The second last paragraph on page 8 of the Investigation Report; and
- The entire section entitled “Forensic Analysis Procedures” on pages 15 and 16 of the Investigation Report.

[19] There are other portions of the record which reference activities such as forensic acquisition of workstations, network logs of internet activity and examination of e-mails. However, these would be routine, common or customary audit techniques.

[20] Pursuant to section 8 of FOIP, SaskPower should give access to as much of the record as possible by severing the portions to which exemptions apply.

[21] SaskPower's submission stated:

As described above, given the past practise of the Applicant in sharing confidential SaskPower information, SaskPower is concerned that the Applicant will disclose the testing or auditing procedures and techniques with current employees associated with the Applicant. Unfortunately it may be necessary to perform tests or audits of [other] employees. The disclosure of Enterprise Security's testing or auditing procedures and techniques will prejudice the results of any testing or audits that may be performed on those individuals.

[22] I am persuaded that the release of the auditing techniques and procedures could reasonably be expected to prejudice the use or results of particular tests or audits. Therefore, subsection 20(a) of FOIP applies to the portions of the record identified in paragraph [18].

[23] As there are no other parts of the records that would qualify as "investigative techniques or procedures", there is no need to consider subsection 15(1)(e) of FOIP.

[24] Upon review of the record, there are details of specific tests to be given or audits to be conducted. Therefore, subsection 20(b) of FOIP does not apply to the record.

#### **4. Did SaskPower properly apply subsection 29(1) of FOIP to the record?**

[25] Subsection 29(1) of FOIP states:

**29(1)** No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[26] SaskPower applied subsection 29(1) of FOIP to four portions of the e-mails. In order for subsection 29(1) to apply, these four portions must constitute personal information of an identifiable individual.

[27] Section 24 of FOIP defines personal information. SaskPower's submission indicates the severed portions qualify as personal information pursuant to subsections 24(1)(b), (h) and (k) of FOIP. The relevant subsections are 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, and includes:

...

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(h) the views or opinions of another individual with respect to the individual;

...

(k) the name of the individual where:

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

(ii) the disclosure of the name itself would reveal personal information about the individual.

[28] The first two severed portions on pages two and three of the e-mails is a list of SaskPower employees and indicates which two individuals participated in each employee's performance evaluation.

[29] This would not qualify as personal information pursuant to subsection 24(1)(b) as indicated by SaskPower's submission. In order to qualify as personal information, the information must be about an identifiable individual and must be personal in nature. While details of performance evaluations would qualify under this subsection, the fact that an individual was evaluated or by whom would not qualify as personal information. They do not reveal information that is personal in nature. These two portions should be released to the Applicant.

[30] The third severed portion on pages 5 and 6 of the e-mail record is a description of the performance of an identifiable individual. It would qualify as personal information pursuant to subsection 24(1)(b), (h) and (k) of FOIP. SaskPower should continue to withhold these sections.

[31] Finally, in the last e-mail, a human resources professional requests that the recipient send the "performance forms" of certain individuals to their managers. SaskPower has

severed the list with the exception of the Applicant's name. This list of names does not qualify as personal information for the same reasons listed above. This should be released to the Applicant.

#### **IV FINDINGS**

[32] Subsections 15(1)(c), (d) and 20(b) of FOIP do not apply to the record.

[33] Subsection 20(a) of FOIP applies to three portions of the record.

[34] Subsection 29(1) of FOIP applies to one portion of the record.

#### **V RECOMMENDATIONS**

[35] I recommend that SaskPower release the entire record to the Applicant with the following exceptions:

- The first non-bulleted paragraph on page 7 of the Investigation Report;
- The second last paragraph on page 8 of the Investigation Report;
- The entire section entitled "Forensic Analysis Procedures" on pages 15 and 16 of the Investigation Report; and
- The third severed portion on pages 5 and 6 of the e-mails.

Dated at Regina, in the Province of Saskatchewan, this 9th day of October, 2015.

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