



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 205-2023

Saskatchewan Telecommunications

November 28, 2023

Summary:

The Applicant submitted an access to information request to Saskatchewan Telecommunications (SaskTel). SaskTel refused access to the record pursuant to subsections 15(1)(e), 18(1)(f), 18(1)(h) and 20(a) of *The Freedom of Information and Protection of Privacy Act*. The Applicant requested the Commissioner undertake a review of SaskTel's decision. The Commissioner found that SaskTel did not properly apply the exemptions to the record. The Commissioner recommended that SaskTel release the record within 30 days of the issuance of this Report.

I BACKGROUND

[1] On July 28, 2023, the Applicant emailed Saskatchewan Telecommunications (SaskTel) an access to information request form requesting their own personal information for the following for the time period of "30 days":

On May 9th and May 10th, 2023 I was denied cellular service by SaskTel. I need to know why this happened. I have good credit. I need to know who the employees are that work for SaskTel that are responsible [sic] for this discrimination against me.

[2] On August 28, 2023, SaskTel responded to the Applicant advising that access has been refused pursuant to subsections 15(1)(e), 18(1)(f), 18(1)(h) and 20(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On September 1, 2023, the Applicant submitted a request for review to my office.

[4] On September 15, 2023, my office notified SaskTel and the Applicant of my intention to undertake a review.

[5] On September 18, 2023, the Applicant provided my office with their submission. On November 15, 2023, SaskTel provided its submission.

II RECORDS AT ISSUE

[6] SaskTel's index of records describes the responsive record as a "screenshot of Account Profile." The record contains a single field screenshot or view from the Applicant's Account Profile. SaskTel denied access to the full screenshot, which includes the field name and response, pursuant to subsections 15(1)(e), 18(1)(f), 18(1)(h) and 20(a) of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] SaskTel is a "government institution" as defined by subsection 2(1)(d)(ii) of FOIP and subsection 3(a) and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I find that I have jurisdiction to conduct this review.

2. Did SaskTel properly apply subsection 15(1)(e) of FOIP to the record?

[8] Subsection 15(1)(e) of FOIP provides:

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

...

(e) reveal investigative techniques or procedures currently in use or likely to be used;

[9] My office uses the following three-part test to determine if subsection 15(1)(e) of FOIP applies:

1. Does the information in question constitute “investigative techniques” or “procedures”?
2. Are the investigative techniques and/or procedures in use or likely to be used?
3. Could disclosure reveal investigative techniques or procedures?

(*Guide to FOIP*, Chapter 4: “Exemptions from the Right of Access”, Updated April 30, 2021 [*Guide to FOIP*, Ch. 4], pp. 17-20)

[10] I will consider each part of this test.

1. *Does the information in question constitute “investigative techniques” or “procedures”?*

[11] The *Guide to FOIP*, on page 58, provides the following definition:

- “Investigative techniques and procedures” means techniques and procedures used to conduct an investigation or inquiry for the purpose of law enforcement.
 - The techniques or procedures must include specific steps. General information (such as forms and standard policies that do not include specific investigative steps and procedures) would not qualify.
 - Routine, common or customary investigative techniques and procedures would not qualify.
 - Generally known investigative techniques and procedures which the public is already aware of would not qualify.

It does not include well-known investigative techniques, such as wire-tapping, fingerprinting and standard sources of information about individuals’ addresses, personal liabilities, real property, etc.

[12] SaskTel’s submission indicates that disclosure:

... would reveal its investigative techniques and procedures that are currently employed within SaskTel. Such information relates to information about the testing for fraud activities, fraud prevention techniques and procedures the disclosure of which would reasonably be anticipated to undermine the utility or outcomes of our fraud detection procedures...

[13] SaskTel added that the system it utilizes alerts it to individuals and credentials involved in “fraudulent activity in the past” and provides “various ratings of creditworthiness”. SaskTel’s concern appears to be that the record could identify the specific methods it uses. According to SaskTel, “while the concept and investigative techniques used by the credit check industry are widely known by the public, the [...] is not.” SaskTel also provided my office with a copy of its procedures related to this system.

[14] Based on SaskTel’s explanation, it appears it is looking to measure an individual’s “creditworthiness”, which is typically defined as an indication of a person’s suitability to receive credit based on their ability to repay. In this context, then, SaskTel is not using techniques to investigate if a customer has committed fraud; rather, it is confirming if fraudulent activity has occurred after this has already been investigated. SaskTel states that its “testing procedures include accredit [sic] check as well.” Because of this, the information withheld in the record does not reveal any specific underlying techniques or procedures utilized.

[15] As the first part of the test is not met, there is no need for me to consider the other parts of the test. I find that SaskTel did not properly apply subsection 15(1)(e) of FOIP. I will move on to consider the other exemptions SaskTel applied to the record.

3. Did SaskTel properly apply subsection 18(1)(f) of FOIP to the record?

[16] Subsection 18(1)(f) of FOIP provides:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[17] To determine if subsection 18(1)(f) of FOIP applies to the record, the following test can be applied:

Could disclosure reasonably be expected to prejudice the economic interests of the Government of Saskatchewan or a government institution?

(*Guide to FOIP*, p. 182)

[18] The *Guide to FOIP*, at pages 182 to 185, provides the following regarding this exemption and test used:

- “Could reasonably be expected to” means there must be a reasonable expectation that disclosure could prejudice the economic interests of the government institution or the Government of Saskatchewan...

The government institution does not have to prove that a harm is probable, but needs to show that there is a “reasonable expectation of harm” if any of the information were to be released. In *British Columbia (Minister of Citizens’ Service) v. British Columbia (Information and Privacy Commissioner)*, (2012), Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- show how the disclosure of the information would cause harm;
- indicate the extent of harm that would result; and
- provide facts to support the assertions made.

A reasonable expectation of prejudice to economic interest is not established by simply asserting that disclosure of records would result in financial loss or that it would interfere in future business dealings. Nor is it established by the mere prospect of heightened competition flowing from disclosure: *Canadian Broadcasting Corp. v Canada (National Capital Commission)*, 147 FTR (Fed CT). The use of the word “reasonably” in subsection 18(1)(f) adds an objective and qualitative element to the analysis required: *Kattenburg v Manitoba (Industry, Trade and Tourism)* (1999), 143 Man R 92d 42 (Man QB).

While direct evidence of specific future harm is not required, there must be an explanation based on the evidence to establish that the harm feared is more than speculative or “merely possible”. The evidence must be more than conjecture: *Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683.

- “Prejudice” in this context refers to detriment to economic interests.

- “Economic interests” refers to both the broad interests of a government institution and, for the government as a whole, in managing the production, distribution and consumption of goods and services. This also covers financial matters such as the management of assets and liabilities by a government institution and the government institution’s ability to protect its own or the government’s interests in financial transactions.

Examples of harm to economic interests can include:

- information in budget preparation documents which could result in segments of the private sector taking actions affecting the government’s ability to meet economic goals. (Note: approved budgets are not included as they are tabled in the Legislature as public documents.)
- background material to be used in establishing land costs which if released would affect revenue from the sale of the land.

[19] SaskTel stated its use of its procedures or the system in question indicate if customers have been “involved in fraudulent activity” or are “using a fictitious or stolen identity at the point of sale.” SaskTel added that:

Disclosure of SaskTel’s use of the [name of system] tool places SaskTel’s ability to manage its economic interests in jeopardy and puts the prevention of these losses at risk. Lastly, it also puts SaskTel’s ability to participate in programs that prevent economic harm... at risk and would set a precedent that prejudices SaskTel’s participation in similar programs.

[20] Section 18 of Ontario’s *Freedom of Information and Protection of Privacy Act* (ON FIPPA) contains clauses that are substantially similar to those found in section 18 of FOIP. In particular, subsection 18(1)(c) of ON FIPPA states as follows:

18(1) A head may refuse to disclose a record that contains,

...

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[21] In [Order PO-3594](#), the Ontario Information and Privacy Commissioner (ON IPC) considered that the general purpose of section 18 of ON’s FIPPA is to protect certain economic interests to the extent that commercially valuable information may be exempt. The ON IPC added that the intent of subsection 18(1)(c) of ON’s FIPPA is to “protect the

ability of institutions to earn money in the marketplace.” The ON IPC added that subsection 18(1)(c) of ON’s FIPPA recognizes that government institutions may have economic interests where it competes for business with other public or private sector entities. A refusal to disclose information must be to protect the government institution from its ability to compete. The ON IPC added that there must be clear evidence to show that the alleged harm could reasonably be expected to occur. Again, it does not need to be a certainty that it will.

[22] Similarly, section 18 of FOIP is intended to protect commercially valuable information, while subsection 18(1)(f) of FOIP protects information, the disclosure of which can prejudice a government institution’s economic interests.

[23] SaskTel has argued that it uses the system in question to detect the presence of fraudulent activity, and states that this helps it avoid “bad debt”. It is not apparent to me, however, that the use of the system (or of its name) is commercially valuable to the extent that it, for example, helps SaskTel compete in the marketplace, thereby prejudicing its economic interests. SaskTel has provided insufficient evidence and argument to demonstrate that the information withheld falls into this category of exemption.

[24] As such, the first part of the test is not met, and I find that SaskTel did not properly apply subsection 18(1)(f) of FOIP. I will still consider subsections 18(1)(h) and 20(a) of FOIP’s application to the record.

4. Did SaskTel properly apply subsection 18(1)(h) of FOIP to the record?

[25] Subsection 18(1)(h) of FOIP provides:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(h) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.

[26] To determine if subsection 18(1)(h) of FOIP applies to the record, the following test must be met:

Could disclosure reasonable be expected to result in an undue benefit or loss to a person?

(*Guide to FOIP*, p. 188)

[27] The *Guide to FOIP*, at pages 189 to 190, provides the following regarding this exemption and test used:

- “Undue” means excessive or disproportionate.

The word ‘undue’ must be given real meaning, determined in the circumstances of each case. Generally speaking, that which is ‘undue’ can only be measured against that which is ‘due’.

Persons or businesses that contract with public bodies (local authorities, government institutions, and health trustees) must have some understanding that those dealings are necessarily more transparent than purely private transactions. Even if one assumes loss could be expected to the person or business, such loss would not be ‘undue’.

- “Benefit” means a favourable or helpful factor or circumstance; advantage, profit.
- “Loss” means an undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way.
- “Person” includes an individual, corporation or the heirs, executors, administrators or other legal representatives of a person.

[28] Examples can include:

- The disclosure of confidential information about the government’s intention to buy certain property might result in third parties buying the property in anticipation of profits from the government’s acquisition.
- Premature disclosure of information about a change in revenue sources, such as taxes, duties or tariff rates, could result in undue benefit to a third party.
- Disclosure of the specifications of special testing equipment or software developed by a government institution that have been kept secret or confidential could reasonably be expected to result in improper benefit.

[29] SaskTel's submission indicates that the arguments it raised for the application of subsection 18(1)(f) of FOIP are "equally applicable" to subsection 18(1)(h) of FOIP. SaskTel submits:

The harm that could result in disclosure of the record is probable and goes beyond merely possible. Fraudsters, by their very nature, are always looking at ways to circumvent protective and investigatory tools. SaskTel submits that given that a [match in the system] identifies a person as a fraudster, there is a reasonable expectation of a loss to occur. The loss itself would be undue, namely excessive or disproportionate, since it would be directly related to costs incurred...

[30] As previously stated, SaskTel utilizes certain procedures or methods to detect fraudulent activity. SaskTel's argument is that knowledge of its methods could lead fraudsters to understand how to circumvent the processes or tools SaskTel uses in order for their own benefit or gain, which would result in losses to be incurred.

[31] In [Order 00-10](#) and [Order F08-11](#), the British Columbia Information and Privacy Commissioner (BC IPC) considered the meaning of "undue" as it applies to section 17 of British Columbia's *Freedom of Information and Protection of Privacy Act* (BC FIPPA), which, like section 18 of FOIP, speaks to the disclosure of information that may be harmful to the financial or economic interests of a government institution. In considering how loss or gain would be "undue" and in what context, the BC IPC stated this about a matter between Labatt and Molson breweries:

[26] Commissioner Loukidelis considered the meaning of "undue financial loss or gain" in the context of s. 21(1)(c)(iii)[24] in Order 00-10,[25] where Pacific Western Brewing Company had requested certain information about Molson Breweries and Labatt Breweries. He considered the "ordinary meanings" of "undue", such as "unwarranted, inappropriate, improper" and "excessive or disproportionate". He also noted that, whether or not the expected gain or loss is significant, it may also be "undue". He concluded the following:

- any financial loss to Labatt and Molson would be "undue" because it would be both "unfair and inappropriate" and significant ("in the millions of dollars");
- although the evidence did not allow him to determine how much Pacific Western would save by not having to pay for the information, **any corresponding gain to Pacific Western would be "undue", because it would gain valuable competitive information for free, "a competitive windfall" or "something for nothing";** and

- **Pacific Western would gain “some competitive advantage” over Labatt and Molson because it could make inroads into their market share.**

[Emphasis added]

[32] In the matter before me, disclosure of the name of the system SaskTel uses could, as SaskTel asserts, reveal information SaskTel does not want people to know. However, for the purposes of section 18 of FOIP, it is not apparent that the Applicant is in direct competition with SaskTel hoping to gain some competitive market advantage over SaskTel. Again, it is not clear to me how the information in question fits within the purpose of this particular exemption, and SaskTel has not demonstrated how.

[33] As the first part of the test is not met, I find SaskTel did not properly apply subsection 18(1)(h) of FOIP. I will now consider subsection 20(a) of FOIP.

5. Did SaskTel properly apply subsection 20(a) of FOIP to the record?

[34] Subsection 20(a) of FOIP provides:

20 A head may refuse to give access to a record that contains information relating to:

(a) testing or auditing procedures or techniques;

...

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[35] To determine if subsection 20(a) of FOIP applies to the record, the following two-part test must be met:

1. Does the record contain information relating to testing or auditing procedures or techniques?
2. Could disclosure reasonably be expected to prejudice the use or results of particular tests or audits?

(Guide to FOIP, pp. 244 – 245)

[36] I will consider each part of this test.

1. Does the record contain information relating to testing or auditing procedures or techniques?

[37] SaskTel's submission provides:

In the present case, SaskTel asserts that the testing procedures involves testing a customer's creditworthiness. The testing procedures include accredit [sic] check as well as the [system in place]. Disclosure of the grounds for designating [a customer] as a [match in the system] would, in fact, divulge the testing procedures and investigative techniques currently employed by our organization for the purpose of fraud detection.

[38] Pages 244 and 245 of the *Guide to FOIP*, provide the following relevant definitions:

- "Relating to" should be given a plain but expansive meaning. The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute. "Relating to" requires some connection between the information and the testing or auditing procedures or techniques.
- A "test" is a set of questions, exercises, or practical activities that measure either what someone knows or what someone or something is like or can do.
- "Procedures" are the manner of proceeding; a system of proceeding; conduct, behavior.
- "Techniques" are the manner of execution or performance in relation to mechanical or formal details; a skillful or efficient way of doing or achieving something.

[39] The terms testing and auditing cover a wide range of activities. Examples include environmental testing, language testing, personnel audits, financial audits, staffing examinations and program audits. The exemption applies to testing and auditing carried out by government institutions, consultants and contractors. For subsection 20(a), the provision primarily protects testing or auditing procedures and techniques; the testing/auditing mechanism, not the content. The exemption does not cover the results of tests or audits.

[40] As noted above, this exemption does not cover the results of tests or audits. In this case, SaskTel is stating that disclosure of the name of the system would reveal its testing

procedures for determining creditworthiness. Running the names of customers through a system to check their “creditworthiness”, though, does not involve using a test or testing procedures, such as a set of questions, exercises or practical activities. As such, the first part of the test is not met, and I find that SaskTel did not properly apply subsection 20(a) of FOIP.

[41] In summary, as I have found that SaskTel did not properly apply subsections 15(1)(e), 18(1)(f), 18(1)(h) and 20(a) of FOIP, I recommend it release the record to the Applicant, in full, within 30 days of the issuance of this Report.

IV FINDINGS

[42] I find that I have jurisdiction to conduct this review.

[43] I find that SaskTel did not properly apply subsections 15(1)(e), 18(1)(f), 18(1)(h) and 20(a) of FOIP.

V RECOMMENDATION

[44] I recommend that SaskTel release the record to the Applicant, in full, within 30 days of the issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 28th day of November, 2023.

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