



INVESTIGATION REPORT 002-2018

Saskatchewan Polytechnic

June 5, 2018

Summary: The Complainant, an employee at Saskatchewan Polytechnic (SaskPolytech), had her personal information disclosed by SaskPolytech's legal counsel at an arbitration hearing. The Information and Privacy Commissioner (IPC) found that there was authority under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for the disclosure. The IPC made a number of recommendations including that SaskPolytech and the Saskatchewan Polytechnic Faculty Association (SPFA) request the particulars of each others' case as well as share a list of witnesses prior to a hearing as an effort to minimize the likelihood of personal information being needlessly disclosed during the hearing.

I BACKGROUND

- [1] This investigation is about the disclosure of the Complainant's personal information at an arbitration hearing. The arbitration hearing was between Saskatchewan Polytechnic (SaskPolytech) and Saskatchewan Polytechnic Faculty Association (SPFA). The hearing was about a grievance filed by one of SPFA's members. The member had been suspended due to harassment allegations. The person who made the allegations against the member is the Complainant's co-worker. The Complainant was a witness for the SPFA. The co-worker was a witness for SaskPolytech.
- [2] To determine what occurred, my office relied on material provided to it by the Complainant and SaskPolytech. It also relied on the written decision by the arbitrator.
- [3] Based on the written decision by the arbitrator, the Complainant testified about an incident that occurred in the fall of 2016.

- [4] Then, based on material presented to my office by both the Complainant and SaskPolytech, SaskPolytech's legal counsel disclosed the Complainant's personal information from a "Medical Certificate Form" from her personnel file. According to SaskPolytech, the disclosure of personal information was relevant to a line of questioning in a cross-examination that related to statements made by the Complainant during the course of examination by SPFA. The Complainant immediately questioned what the private confidential medical information had to do with the hearing.
- [5] According to the written decision by the arbitrator, it became apparent to both counsel (during the cross-examination) that the particular line of questioning would potentially result in significantly more evidence being required by both sides. Counsel took a break to discuss the situation and they agreed that the Complainant's evidence about the fall 2016 incident should be struck. The arbitrator agreed not to rely on any of that evidence. However, counsel agreed as fact that the Complainant does not like the co-worker because the Complainant believes the co-worker raised unfounded allegations against her.
- [6] The Complainant believed that SaskPolytech's disclosure of her personal information during the cross-examination was a privacy breach. Therefore, in a letter dated October 13, 2017 to SaskPolytech, the Complainant raised concerns about how she believes SaskPolytech breached her privacy and how she believes it needs greater safeguards to ensure similar privacy breaches do not occur in the future. In that letter, the Complainant indicated that after the direct examination by the SPFA, SaskPolytech's legal counsel requested a recess. During the recess, she believes documents contained within her personnel file were either emailed or faxed to the hotel at which the hearing was taking place. She alleges then SaskPolytech had requested hotel staff to photocopy the documents. Then, she alleges the documents were discussed among SaskPolytech's legal counsel, SaskPolytech staff, the co-worker, and the co-worker's husband. Then, her personal information was disclosed further during the hearing.
- [7] In a letter dated December 7, 2017, SaskPolytech responded to the Complainant. It said that documents were not emailed, faxed, nor photocopied. It said that it had learned the Complainant would be testifying as a witness for the SPFA the day before the hearing. The

HR Consultant brought the Complainant's complete personnel file to the hearing the next day. It said that during the recess, a "preliminary discussion" occurred between SaskPolytech staff, SaskPolytech's legal counsel, the co-worker, and the co-worker's husband, to determine the general approach for how to proceed in the cross-examination in response to statements the Complainant had made during her direct examination. It said the co-worker was present at the hearing because the grievance involved the co-worker. Then, according to SaskPolytech, the co-worker and her husband left the discussion. It was at that point that SaskPolytech staff and legal counsel reviewed the Complainant's personnel file to attain the documents that would be relevant in the cross-examination. Finally, SaskPolytech asserted it believes the documents from the Complainant's personnel file were directly relevant to statements the Complainant had made during her examination by SPFA. It believed that the Complainant had made inaccurate statements during the examination so it used documentary evidence from her personnel file to support that assessment during the cross-examination.

[8] The Complainant was dissatisfied with SaskPolytech's response. Therefore, she complained to my office on January 9, 2018.

[9] On January 11, 2018, my office notified the Complainant and SaskPolytech that it would be undertaking an investigation.

II DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[10] SaskPolytech is a local authority as defined by subsection 2(f)(x) of LA FOIP. Thus, I have the authority to carry out this investigation.

2. Is personal information involved?

[11] LA FOIP provides the rules for local authorities on how to collect, use, and/or disclose personal information. At issue is whether the information contained within the

Complainant's medical certificate form would qualify as personal information. Subsection 23(1)(c) of LA FOIP defines personal information as follows:

23(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:

...

(c) information that relates to health care that has been received by the individual or to the health history of the individual;

[12] I find that the information at issue qualifies as personal information as defined by subsection 23(1)(c) of LA FOIP.

3. Does LA FOIP authorize SaskPolytech to disclose the Complainant's personal information at the arbitration hearing?

[13] Subsection 28(2) of LA FOIP allows the local authority to exercise its discretion as to whether it will disclose personal information in specific circumstances. Specifically, subsection 28(2)(d) of LA FOIP provides as follows:

28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

(d) to legal counsel for a local authority for use in providing legal services to the local authority;

[14] Based on subsection 28(2)(d) of LA FOIP, I find SaskPolytech had the authority to disclose the Complainant's personal information at the arbitration hearing.

[15] I note that the Complainant had originally submitted the personal information to SaskPolytech for a reason other than the arbitration hearing. As such, she was caught off-guard by the disclosure of the personal information at the hearing. Subsection 25(2) of LA FOIP provides that when the local authority collects personal information directly from an individual, it should inform the individual of the purpose for which the information is collected. It provides:

25(2) A local authority that collects personal information that is required by subsection (1) to be collected directly from an individual shall, where reasonably

practicable, inform the individual of the purpose for which the information is collected.

[16] To fulfill their obligations under subsection 25(2) of LA FOIP, local authorities often include a notice on the forms indicating the purpose for which the information is collected and to inform the individual that the personal information will be managed in accordance with LA FOIP. Local authorities could explain to individuals that LA FOIP permits disclosure of personal information in certain circumstances without consent, including in arbitration hearings. I recommend that SaskPolytech ensure it is fulfilling its obligations pursuant to subsection 25(2) of LA FOIP, including ensuring notices are given to employees prior to or at the time that personal information is being collected. This could be achieved by including notices on forms that SaskPolytech uses to collect personal information from its employees, such as timecards and medical certificate forms

[17] In response to my office's draft report, SaskPolytech indicated to my office that it now requires its employees to sign the following "declaration of consent" when they accept an employment position:

I consent to Saskatchewan Polytechnic collecting, using, and disclosing my personal information in accordance with *The Local Authority Freedom of Information and Protection of Privacy Act* (Saskatchewan) and the Personal Information Protection and Electronic Documents Act (Canada) for the following employment purposes: the administration of compensation and benefits, communication with employees, including in compassionate circumstances, statistical purposes, to administer leaves, reviews, discipline, or other investigations, for various service providers as required, for reporting purposes to provincial and federal government, or when required by law, in accordance with any Collective Bargaining Agreements that may be in effect.

[18] SaskPolytech must collect, use, and disclose personal information in accordance with LA FOIP regardless of whether an individual provides consent or not. Instead of obtaining consent, I recommend that SaskPolytech inform its employees of LA FOIP and ask that employees sign a form that acknowledges that they have been informed about how their personal information will be collected, used, and/or disclosed in accordance with LA FOIP.

4. Does SaskPolytech have appropriate safeguards to protect the Complainant's personal information?

- [19] In spite of my findings that there was authority under LA FOIP to disclose personal information in these circumstances, I note how invasive this type of disclosure is. Privacy is important so individuals can maintain their autonomy and dignity, especially among their colleagues and peers with whom they must have ongoing interactions.
- [20] In this case, it appears that the Complainant was not prepared to have such personal information be disclosed at an arbitration hearing about a dispute between two others. According to the written decision by the arbitrator, the Complainant had indicated she never knew this hearing was going on until a couple of days before she testified when the SPFA called her. Similarly, SaskPolytech indicated that it had learned the Complainant would be a witness, the day before the hearing. This suggests that there may not have been much time for the SPFA to share particulars with SaskPolytech and give time to SaskPolytech to prepare. If there was additional time for both parties to prepare prior to the hearing, then it is possible that counsel for both parties may have been able to discuss whether examining and cross-examining the Complainant regarding the incident in the fall 2016 was unnecessary.
- [21] In my office's Investigation Report 109-2016, I recommended that prior to a hearing, both parties carefully review evidence that is submitted and redact or de-identify as much of the personal information or personal health information as possible. Further, in W. Robert Pelton's *Arbitration from the Arbitrator's Perspective*, Pelton recommends that when counsel is left in doubt as to the other side's case, counsel should request the particulars from opposing counsel. Pelton indicated that if, at the hearing itself, if one side is caught by surprise, most arbitrators will grant an adjournment to enable the side which was caught by surprise, time to prepare, especially in cases where particulars have been sought in advance and not provided.
- [22] I make similar recommendations in this case. I recommend that SaskPolytech and SPFA consider adding a provision within its next collective bargaining agreement where, prior to any arbitration hearing, each party will exchange the particulars of each other's case as well as sharing a list of witnesses. Both parties should agree to cooperate and redact or de-identify as much of the personal information or personal health information as possible that

is irrelevant to the case. Doing so can prevent both parties and/or witnesses from having personal information needlessly disclosed during the hearing. My office's resource *Guidelines for Arbitrators in Saskatchewan* provides a set of questions that both SaskPolytech and SPFA should consider prior to commencing arbitration:

- What personal information and personal health information is really required in order to go through each stage of the arbitration process (need-to-know vs nice-to-know)?
- Is there any immaterial personal information and personal health information that should not be included for the arbitration process such as unique identifiers (social insurance numbers, health services numbers, bank account numbers, etc.)?
- Is it appropriate for the public body to mask or de-identify the information before providing it to the arbitrator or opposing party?
- What will happen to the personal information and personal health information provided to the arbitrator once the process is concluded? Will it be retained by the arbitrator or returned to the public body?
- What are the expectations or requirements of confidentiality and are these requirements adequately addressed in the agreement engaging the arbitrator?
- Is there authority and/or is it necessary to make the decision publicly available?

[23] Further, LA FOIP was recently amended to include an explicit duty to protect personal information, which is as follows:

23.1 Subject to the regulations, a local authority 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;
- (b) protect against any reasonably anticipated:
 - (i) threat or hazard to the security or integrity of the personal information in its possession or under its control;
 - (ii) loss of the personal information in its possession or under its control;
 - or
 - (iii) unauthorized access to or use, disclosure or modification of the personal information in its possession or under its control; and

(c) otherwise ensure compliance with this Act by its employees.

[24] Even though the above explicit duty to protect was not in place at the time of the disclosure, SaskPolytech must be taking steps to ensure it is complying with section 23.1 of LA FOIP now. SaskPolytech indicated to my office that is undertaking the following four initiatives to refine its privacy awareness and expectations within its Human Resources office:

1. That its Human Resources Office receives privacy training, which includes an online component on basic privacy knowledge for employees of local authorities and a session with a lawyer who specializes in privacy to answer workplace-specific privacy questions,
2. That the Director of Human Resources Systems and Reporting develop written guidelines for human resources employees in the handling of personnel files, including in arbitration/legal hearings, and to increase the security of medical certificates,
3. That the Privacy Office review SaskPolytech's policies to ensure they are adequate in providing guidance on privacy issues, including whether the policies provide adequate guidance on what employees can expect with regard to the collection, use, and disclosure of personal information in various contexts and situations.
4. That the Privacy Office will discuss with SaskPolytech's external legal counsel to determine potential opportunities for improvement, particularly implementing best practices with regard to the sensitivity in using personal information in arbitrations.

[25] I find that the above four steps are appropriate. To build on the above, I recommend that SaskPolytech and SPFA refer to my office's resource *Guidelines for Arbitrators*. Specifically, both SaskPolytech and SPFA should request the particulars of each others' case as well as share a list of witnesses. This could prevent SaskPolytech from needing to bring an entire personnel file to the arbitration hearing and minimize the risk of a privacy breach. In this case, because it appears there was no sharing of particulars or list of witnesses, SaskPolytech had to bring the Complainant's entire personnel file to the hearing.

[26] Further, as SaskPolytech works on developing written guidelines as mentioned in paragraph [24], it should consider including some of the instruction in paragraphs [22] and [23] in my Investigation Report 103-2017 and paragraph [33] in my Investigation Report 299-2017.

III FINDINGS

[27] I find that the information at issue qualifies as personal information as defined by subsection 23(1)(c) of LA FOIP.

[28] I find Saskatchewan Polytechnic had the authority to disclose the Complainant's personal information at the arbitration hearing.

IV RECOMMENDATIONS

[29] I recommend that SaskPolytech ensure it is fulfilling its obligations pursuant to subsection 25(2) of LA FOIP, including ensuring notices are given to employees prior to or at the time that personal information is being collected. Local authorities could explain to individuals that LA FOIP permits disclosure of personal information in certain circumstances without consent, including in arbitration hearings.

[30] I recommend that SaskPolytech inform its employees of LA FOIP and ask that employees sign a form that acknowledges that they have been informed about how their personal information will be collected, used, and/or disclosed in accordance with LA FOIP.

[31] I recommend that SaskPolytech and SPFA consider adding a provision within its next collective bargaining agreement where, prior to any arbitration hearing, each party will exchange the particulars of each other's case as well as sharing a list of witnesses. Both parties should agree to cooperate and redact or de-identify as much of the personal information or personal health information as possible that is irrelevant to the case.

[32] I recommend that SaskPolytech follow through with its own recommendations described at paragraph [24].

[33] I recommend that SaskPolytech and SPFA request the particulars of each others' case as well as share a list of witnesses prior to a hearing.

Dated at Regina, in the Province of Saskatchewan, this 5th day of June, 2018.

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