

**Report to the
Standing Committee on Crown and
Central Agencies**

**Regarding
Disclosure of payee information**

October 2004



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October 12, 2004

Mr. Graham Addley, Chair
Standing Committee on Crown and Central Agencies
Room 203, Legislative Building
REGINA, Saskatchewan
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Dear Mr. Addley:

On June 17, 2003, the Standing Committee on Crown Corporations adopted a new policy on the disclosure of payee information by CIC Crown corporations and related entities.

I indicated to the Committee that my Office would be monitoring the implementation of the policy and would bring any issues to the Committee's attention. This report contains my comments on this topic for the year ended December 31, 2003.

Yours truly,



Fred Wendel, CMA, CA
Provincial Auditor

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Disclosure of payee information

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Main points

Crown Investments Corporation of Saskatchewan and its related corporations are publishing additional information about their payments for the first time. This is a significant improvement in public sector accountability.

Overall, Crown corporations have done a good job in presenting this information. However, to improve future reporting, the Standing Committee on Crown and Central Agencies needs to clarify its requirements. There is a lack of clarity concerning the three exemptions that are permitted under the general disclosure policy and the information required for employee expenses. Also, Crown corporations need to provide more complete payee information to comply with the Committee's disclosure policy.

Introduction

In June 2003, the Standing Committee on Crown Corporations (Committee) recommended that Crown Investments Corporation of Saskatchewan (CIC) and its related corporations disclose additional information about persons (payees) who receive money from these corporations and the amounts they receive (see exhibit on page 12). The Legislative Assembly concurred.

For many years, my Office has reported the need for these corporations to improve their accountability by providing more payee information to the Assembly. We commend the Committee for making this important improvement to the accountability of Crown corporations.

The Committee's recommendation is important because:

- ◆ it reminds government officials that they are spending public money;
- ◆ it adds rigour to decision making as it ensures those who spend public money know that their use of that money will be made public; and
- ◆ it ensures that legislators and the public know who has received public money.

Our Office gave an undertaking to the Committee to monitor the process and ensure the policy is followed. We also stated that we would consult with the Information and Privacy Commissioner and bring any issues to the Committee's attention.

In 2004, the Committee's responsibilities were assumed by the Standing Committee on Crown and Central Agencies. The term "Committee" is used in this report to refer to the new Committee where the context requires.

Clarification of policy is required

Exemptions from the general policy

During its deliberations, the Committee discussed the need for exemptions from the general payee disclosure policy. The policy describes three exemptions from public disclosure. These exemptions are based on those granted to Crown corporations in *The Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The policy states that payments do not need to be disclosed to the Committee when:

- i) there is a legitimate need to protect commercially sensitive information;
- ii) disclosure could reasonably be expected to prejudice the competitive position of, or interfere with the contractual obligations of, the Crown corporation or a third party; or
- iii) disclosure is prohibited by law, including the provisions of the FOIP Act.

A Committee member stated that allowing exemptions from public disclosure in these three circumstances demonstrated an understanding of the need for confidentiality in certain business transactions. The member listed the following four categories of payments as examples of the types of payments identified by the Crowns where there may be valid reasons to keep payee information private.

- ◆ Saskatchewan Government Insurance's (SGI) payments under reinsurance programs and payments to brokers;
- ◆ SaskEnergy's payments under gas supply contracts;
- ◆ SaskPower's payments under power purchase agreements; and
- ◆ SaskTel's payments under dealer arrangements.

Our Office interpreted the Member's comments as an acknowledgement by the Committee of the concerns raised by the Crowns and an

explanation of the rationale for the three exemptions permitted under the Committee's formal policy.

However, the four above-noted Crown corporations interpreted the Member's comments differently. They interpreted the comments to mean that all payments in the above-noted categories are exempt from disclosure, even those that do not meet the terms of one of the three permitted exemptions under the Committee's policy.

Due to the interpretation taken by these corporations, the following information has not been reported for 2003:

- ◆ SaskEnergy has not reported payments to 70 suppliers from whom it purchased natural gas;
- ◆ SaskPower has not reported payments to 13 suppliers from whom it purchased electrical power;
- ◆ SaskTel has not reported payments to 127 payees who are dealers for the corporation; and
- ◆ SGI has not reported payments to 913 payees who are brokers and issuers, and 49 payees who are reinsurers.

We plan to work with Crown corporations and the Information and Privacy Commissioner to assess whether disclosing the above payee information would cause harm to a corporation or to a payee. We will report our findings to the Committee at a later date.

Employee pay and expenses

The Committee's policy requires corporations to disclose "other expenses" paid to employees. In practice, however, corporations had difficulty interpreting what types of payments (e.g., in-province travel, car allowances, course tuition) to include in this category. Also, other government organizations, e.g., departments and agencies, are not required to report expenses paid to employees. Therefore, for 2003, each Crown corporation has reported out-of-province travel expenses for its executive and senior management employees. This is similar to the type of information provided to the Committee in 2002.

Disclosure of payee information

1. **We recommend that the Committee either confirm that the disclosure of out-of-province travel expenses for executive and senior management employees meets the Committee's requirements or clarify its interpretation of "other expenses."**

Process followed in 2003

In the fall of 2003, our Office developed a standard format and guide for Crown corporations to use to prepare their lists in a clear and consistent manner. We did this in consultation with all Crown corporations. We also gave them our suggestions whenever they had questions about the process or about matters related to the preparation of their lists. For example, when the issue of how to identify employee expenses arose, we obtained a consensus position of all Crown corporations as noted above, pending clarification of the Committee's requirements. Also, for several corporations, we were able to review their draft lists for 2003 and advise them whether we had any concerns.

In some cases, management notified suppliers and consultants that the corporation planned to disclose the aggregate amount paid to them unless they responded that they met one of the Committee's three criteria for exemption from public disclosure. Crown corporations sent these letters based on internal legal advice. Letters were sent to consultants although no exemptions for payments to consultants are allowed under the Committee's policy. Corporations generally accepted a payee's representation that it met one of the criteria without attempting to verify it. For some corporations, this has resulted in many undisclosed payments where there does not appear to be a valid reason to keep them private.

Consultation with Commissioner

We consulted with the Information and Privacy Commissioner to seek his advice. He is a lawyer and an Officer of the Legislative Assembly. He is responsible for all matters related to freedom of information and protection of privacy in Saskatchewan's public sector including interpretation of the FOIP Act. We wanted to get a clear understanding of the types of payment information that would meet the Committee's criteria for exemption from public disclosure. As noted by a Committee member, input from the Commissioner is available to the Provincial Auditor, to an individual Crown corporation, or to the Committee as necessary.

Detailed support for exclusions is needed

The Commissioner indicated that, to assess whether non-disclosure of a particular payee complies with the Committee's policy, he would follow a similar process as he would to assess a request for access to the same information under the FOIP Act. Under the FOIP Act, the onus is on the Crown corporation to provide evidence demonstrating a direct connection between the disclosure of the information and its impact on the economic interests of the corporation or a supplier. It would not be sufficient to rely on a supplier's representation to that effect. Furthermore, convincing evidence would be required that there is a reasonable expectation of probable harm, and the evidence must involve more than speculation or a possibility of harm. This requires detailed evidence and submissions including affidavit material in some cases. Simply asserting a general concern is clearly insufficient.

Accordingly, the Crown corporations with undisclosed payees have not assembled sufficient convincing evidence to demonstrate the relationship between disclosing the payee information and harm it would cause. They need to do so. Alternately, they should disclose this payee information to the Committee.

In the Commissioner's experience there are very few cases, when applying the three exemptions permitted under the Committee's policy, where an exemption from public disclosure would be upheld. This is particularly true when the only information disclosed is the name of a payee and the aggregate amount paid to that payee during the year. As noted by the Saskatchewan Court of Appeal, *the [FOIP Act's] basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.*

- 2. We recommend that in the future, Crown corporations assemble and give our Office sufficient convincing evidence to demonstrate the relationship between disclosing the payee information and harm it would cause for each undisclosed payee. Alternately, Crown corporations should disclose this payee information to the Committee.**

Notice to payees is not required

To comply with the Committee's directive, Crown corporations do not need to notify suppliers that information about aggregate payments to them will be disclosed. Sovereignty of the Assembly and its committees is paramount in this regard. *The Legislative Assembly and Executive Council Act* (the LA Act) states that the Assembly is a court and has the power to compel the production of any papers that the Assembly or a committee may consider necessary in any of its proceedings or deliberations.

The LA Act does not require notice to be given to payees. In the Commissioner's view, the LA Act's provisions constitute existing procedures for access to government information and the FOIP Act does not replace those legislative tools for access. In other words, the FOIP Act does not overlay an additional requirement to give notice that Crown corporations must meet before complying with a directive from the Assembly or its committees. Also, other Government organizations do not notify payees before disclosing payee information.

Our review of the payee lists

As noted above, for some corporations, our Office was able to review the draft lists and the processes used to prepare the lists. In those cases, we found that the processes used to produce the required information were adequate. We examined the format of the lists for clarity and conformity with the standard template previously agreed to by all corporations. In addition, we reviewed the lists for possible errors or omissions, paying particular attention to the list of payees that the corporation did not plan to disclose. For the remaining corporations, we reviewed the final lists tabled with the Committee on September 16, 2004.

We examined the support available for a sample of payees that corporations did not plan to disclose. However, we were unable to complete our work because the Crowns with undisclosed payees did not obtain sufficient convincing evidence to support the exclusion of payees from their lists.

Based on our reviews to date, the payee lists prepared by the following corporations appear to be complete:

- ◆ Crown Investments Corporation of Saskatchewan and Capital Pension Plan;
- ◆ Investment Saskatchewan Inc. and its subsidiaries;
- ◆ Saskatchewan Water Corporation;
- ◆ SaskEnergy's subsidiaries except for TransGas Limited;
- ◆ Power Greenhouses Inc. and Power Corporation Superannuation Plan; and
- ◆ SGI Superannuation Plan.

The payee lists prepared by the following corporations exclude certain payments, and we have not seen adequate convincing evidence to support their exclusion:

- ◆ Saskatchewan Opportunities Corporation;
- ◆ Saskatchewan Transportation Company;
- ◆ Information Services Corporation of Saskatchewan;
- ◆ Saskatchewan Government Growth Fund Management Corporation and its subsidiary Fund companies;
- ◆ SaskPower and the following subsidiaries: SaskPower International Inc., Northpoint Energy Solutions Inc.;
- ◆ SaskEnergy and its subsidiary TransGas Limited;
- ◆ SaskTel, its subsidiaries and pension plans; and
- ◆ SGI, its subsidiaries and Saskatchewan Auto Fund.

In most cases, the compendium of lists notes when a corporation had no payments to report. However, the compendium does not indicate that the following entities had no payments over the minimum thresholds: Saskatchewan Development Fund Corporation; Saskatchewan Development Fund; SaskEnergy Chilean Holdings II Ltd.; and SaskEnergy Chilean Holdings Limitada.

During our review, we noted the following examples of payments that corporations did not disclose. Keeping this information private does not appear to be reasonable, or in accordance with the Committee's policy. Some of these examples arise because the corporations did not adequately follow up the responses to the notification letters they sent to payees and did not obtain sufficient convincing evidence to support the payee's representation that reporting their payee information would be harmful.

Disclosure of payee information

- ◆ Payments made to a particular payee have been excluded from one corporation's payee list, when the same payee is included on other Government agencies' payee lists, e.g., KPMG LLP (not reported by SaskEnergy and SGI but reported by CIC and others); Deloitte and Touche LLP (not reported by Information Services Corporation but reported by SaskPower and others); Aon Corporation (not reported by SaskEnergy and SaskTel but reported by SaskPower and others); Purolator Courier Ltd. (not reported by SaskPower and SGI but reported by the General Revenue Fund).
- ◆ Payments made from one Crown corporation to another have not been disclosed, e.g., SaskEnergy did not disclose all of its payments to SaskTel.
- ◆ Information Services Corporation has not disclosed the compensation and expenses of the president or the chief operating officer. Instead, under the Consultants category, it reported a single aggregate total paid to Windward Group of Companies, which is owned by these two persons.
- ◆ SaskEnergy, SGI, and SaskTel have not disclosed payments to some consultants even though the Committee's policy does not allow exemptions for payments to consultants. Furthermore, some payments made to consultants are excluded from a corporation's 2003 payee list, when the same payee is included on the corporation's 2002 payee list provided to the Committee, e.g., SaskEnergy listed payments to Aon Corporation and Pinter & Associates in 2002 but not its payments to them for the same services in 2003.
- ◆ SaskEnergy and SaskTel have disclosed only a portion of the total amount paid to certain suppliers, e.g., their payments to Deloitte and Touche. Therefore, the amounts disclosed are not reliable in all cases.
- ◆ SaskEnergy has not disclosed the names and amounts paid to four employees for salaries and severance payments. SaskTel has not disclosed the names and amounts paid to 26 employees for salaries and severance payments, but has reported that these

payments total \$2,688,160. The rest of the Government discloses salaries and severance payments.

- ◆ SaskEnergy has not disclosed payments to 18 payees where agreements contain a general confidentiality clause. However, the sample confidentiality clause given to us by SaskEnergy states that confidentiality does not extend to information required by a government order or directive.
- ◆ SGI has not disclosed payments to vehicle repair shops, glass shops, and other companies that repair or supply replacements for insured assets. Providing this information would not violate an individual's privacy.

Crown corporations should provide more complete payee information to comply with the Committee's disclosure policy.

Summary

The preparation and public release of payee reports by Crown corporations for 2003 represents substantial progress in public accountability. There are issues that the Crowns need to address for 2004. However, we are hopeful that, with clarification by the Committee of its requirements, Crown corporations will work with our Office and the Information and Privacy Commissioner to resolve these issues.

Treasury Board recently amended its policy on disclosure of payee information. It now requires Government departments and other agencies to publicly disclose all payments over a uniform threshold of \$50,000. The Committee may wish to consider whether a uniform limit is applicable to CIC Crown corporations.

Exhibit – Crown Corporations Payee Disclosure Policy

In June 2003, the Legislative Assembly concurred with the following recommendation of the Standing Committee on Crown Corporations.

Recommendation: That the CIC Crown Corporations and related agencies that are called to appear before the Standing Committee on Crown Corporations publicly disclose the following payee information to the Standing Committee on Crown Corporations:

◆ Board expenses

A list of amounts paid to and on behalf of each person on the board of a Crown Corporation including base retainer, all other remuneration and benefits, and out-of-province travel costs.

◆ Ministerial expenses

Out-of-province travel expenses for the Minister(s) and ministerial staff undertaken on behalf of the Crown Corporation.

◆ Employee remuneration

A list of all employees and the amounts they were paid for salaries, and other expenses with a minimum threshold of \$50,000;

◆ Grants, contributions, donations, and sponsorships

A list of all grants, contributions, donations, and sponsorships with a minimum threshold of \$5,000;

◆ Payments to consultants

Payments to consultants (including legal and advertising fees) totalling over \$10,000; and

◆ Supplier and other payments

A list of payments for goods and services with a minimum threshold of \$50,000, except those items and categories where:

- 1) there is a legitimate need to protect commercially sensitive information;
- 2) disclosure could reasonably be expected to prejudice the competitive position of or interfere with the contractual obligations of the Crown corporation or a third party; or
- 3) disclosure is prohibited by law, including the provisions of the Freedom of Information and Privacy Act.