ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-003

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PARKLAND REGIONAL LIBRARY

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Summary: The Parkland Regional Library installed keystroke logging software on the computer of an information technology employee, unknown to the employee. The employee complained that this collection was not permitted under the *Freedom of Information and Protection of Privacy Act* (the "Act"), and that the collected information had not been adequately protected by the Parkland Library.

The Parkland Library relied on section 33(c) of the Act, which permits collection of information that relates directly to and is necessary for an operating program or activity of a public body. It argued that the collected information was necessary to manage the employee, based on concerns about his productivity, and his use of his working time.

The Commissioner found that the Parkland Library did not have the authority under section 33 of the Act to collect the Applicant's personal information that it collected through keystroke logging. Noting that less-intrusive means were available for collecting information needed for managing, he held that the keystroke logging program collected information about the Applicant's activities during working time that was not necessary to manage him in the circumstances.

However, the Commissioner did not accept the Applicant's argument that the collected information had not been adequately protected.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 33, 33(c), 34, 38, 39, 72, 91.

I. BACKGROUND

[para 1] The Applicant was employed by the Public Body as a computer technician from January 5 until June 21, 2004. Initially his employment was probationary. There was conflicting evidence as to the date of the Applicant's probationary performance review interview. It was in either early May or early June. The Director conducting the performance interview expressed some concerns to the Applicant during the interview that he needed to adopt a more consultative or 'teamwork' approach in fulfilling his duties. Nevertheless at the time of this interview the Applicant successfully completed his probationary period and his probationary status was removed.

[para 2] On May 20, the Public Body's Director instructed that a keystroke logging program be installed on the Applicant's computer. The program logs everything a user does on the computer. The Applicant was not informed this had been done, but he discovered the program on June 17. The Applicant immediately disabled the program on his computer, and eventually removed it altogether. No one other than the Applicant ever viewed the information that had been logged by the program from his computer.

[para 3] The Public Body had given the Applicant permission to conduct personal internet banking on his work computer during non-working time. The Public Body's computer use policy also allowed such use during non-working hours.

II. ISSUES

[para 4] The issues in the Notice of Inquiry are:

- **A.** Did the Public Body collect "personal information" of the Applicant as this term is defined in section 1(n) of the Act?
- **B.** Did the Public Body have the authority to collect the Applicant's personal information under section 33 of the Act?
- **C.** Did the Public Body collect the Applicant's personal information in accordance with section 34 of the Act?
- **D.** Did the Public Body protect the Applicant's personal information as required by section 38 of the Act?
- **E.** Did the Public Body have the authority to use the Applicant's personal information under section 39 of the Act?

[para 5] The following additional issue was raised by the Applicant in his submission.

- **F.** Did the Public Body violate section 91 of the Act?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body collect "personal information" of the Applicant as this term is defined in section 1(n) of the Act?

[para 6] To fall within the terms of section 33, the information that is collected must be 'personal' information. Because the collected information is not before me, I cannot tell what proportion of the collected information was information of the Applicant's personal, non-work-related activity (whether done during working hours or not) and what proportion was his performance of work-related tasks.

[para 7] With respect to information that consists of the performance of work-related tasks, the information that a person types into a computer in the course of performing their work activities may or may not be personal information. For example, the content of a transcription of a tape recording may not be the personal information of the transcriber, but if the transcription reveals errors, or the speed of performance of the task, it may have a personal aspect.

[para 8] In this case I am of the view that if most or even all of the information that was collected was the Applicant's work-related activity, all of it had a personal component in this case, because it was to be used to determine how much work he did, or his style or manner of doing it, or his own choices as to how to prioritize it. Thus in my view the collected information included personal information of the Applicant. The Applicant also gave evidence that his personal banking information was also collected by the software program.

[para 9] The Public Body conceded that the keystroke logging program collected personal information of the Applicant. However, it did raise the suggestion that this collected material might not be properly viewed as 'information' because no one other than the Applicant actually read the information before it was deleted. I do not accept this suggestion. The Public Body itself provided evidence that its managers intended to review this information a couple of weeks after installation to determine exactly what the Applicant was doing on his computer. The material that was collected was readable and was information whether or not any manager read it.

Issue B: Did the Public Body have the authority to collect the Applicant's personal information under section 33 of the Act?

[para 10] The Public Body relied on section 33(c) as authority to collect the Applicant's personal information. Section 33(c) provides:

> *33 No information may be collected by or for a public body unless …*
>
> > *(c) that information relates directly to and is necessary for an operating program or activity of the public body.*

[para 11] In its written submission, the Public Body argued that it was using the software to ensure that its resources (work computers) were being used for the purposes of the Public Body and that any personal use by employees be reasonably limited and controlled. In its oral submission, the Public Body added that managing the people whom it employs to provide its services is an essential activity for the Public Body, and that the collected information was necessary for it to manage the Applicant, arising from a concern that he was not completing tasks.

[para 12] I agree that information that is necessary for the purpose of managing an employee may fall within section 33(c). Employee management could be necessarily incidental to the operation of a program. I also agree that information that allows employers to know how employees are using their working time may, depending on the nature of the information, be necessary for the purpose of managing.

[para 13] To determine if the Public Body had authority to collect personal information under section 33(c), I must review the evidence to see if the information that was collected related directly to and was necessary for the purpose of managing the Applicant as an employee.

Evidence

[para 14] First with regard to the concern that the Applicant was using his work computer for non-work purposes, the Public Body pointed to only a single instance in which the Applicant's supervisor saw that the Applicant's personal website was called up on his screen at a time that the supervisor thought was working time. The supervisor said he believed the Applicant was editing his personal webpage. The Applicant could not specifically recall this incident but disputed that he would be editing his own website during working hours. His explanation was that the website may have been up on his screen but he was not working on it, or the incident did not take place during his working hours.

[para 15] Even if there was an incident such as the supervisor described, it was only one event. I do not accept that this evidence establishes a concern about the Applicant's use of his work computer for personal use that was sufficiently serious to warrant collecting all future keystroke entries. A discussion with the Applicant on this topic, coupled with a warning, if one was thought necessary, would have been a good first step for resolving this issue.

[para 16] With regard to the concern about the Applicant's productivity - on which the Public Body's oral argument was primarily based - I have carefully reviewed the evidence on this point given at the oral inquiry. In my view this evidence does not support the contention that a perceived shortfall in the Applicant's productivity prompted the decision to install the keystroke logging software.

[para 17] According to the Director's initial testimony, she instructed activation of the software because she was uneasy that the Applicant had not 'heard' or 'bought into' concerns she expressed to him at his probationary interview. The concerns were that he

was not being a team player, and was too independent in his approach in finding solutions to work-related information technology problems. It is notable that the Director did not testify that she raised any concern with the Applicant at this interview that he was insufficiently productive or, (more specifically), that he was not completing a sufficient number of "trouble tickets" – the primary activity to which he had been assigned. The Applicant's testimony supported that there was no discussion or warning about under-productivity.

[para 18] In other parts of her testimony, the Director provided a different account of her reasons for directing installation of the software. She mentioned that productivity was difficult to measure relative to information-technology people (in contrast to, for example, book cataloguers). She also said there were a large number of outstanding "trouble logs". However, the Director did not say that she had a reason to be concerned that it was the Applicant's lack of productivity that had given rise to this backlog. Rather, she said that she could not tell whether it had or hadn't – whether he was working on really difficult problems that would take more time, or spending his time on something else. She said she wanted to know what was actually happening and to "get a feel for" the way the Applicant was spending the Public Body's time.

[para 19] Looking at the totality of the Director's evidence, there is some internal conflict as to what exactly motivated her to have the software program activated on the Applicant's computer. On the one hand, she tied her decision to her concern about his "maverick" working style; on the other, she tied it, more loosely, to her inability to know whether he was or was not being productive on routine troubleshooting tasks. I can conclude the Director wanted to know how the Applicant was using his working time. However, I cannot say definitively, any more than she did in her evidence, that she had reasons for believing the Applicant was unproductive. I am similarly left in doubt as to which of her concerns prompted her to direct the installation of the software.

[para 20] The Applicant's supervisor also gave testimony about the Applicant's work. He said he had two concerns. One was that the Applicant was spending working time on personal pursuits, as indicated by the single incident to which I have already referred. The other was that the Applicant was using his time on work-related tasks that had a lower priority than "trouble-ticketing" tasks. He referred to an instance in which the Applicant was spending time installing an "insta-messaging" program. He conceded that he and the Applicant had discussed the utility of this program for all the staff, but denied specifically instructing or permitting the Applicant to install it. Apart from his awareness that the Applicant did spend time on work-related projects other than the customer service "trouble logs", the supervisor did not indicate whether or on what basis he thought the Applicant was actually under-producing relative to "trouble-ticketing".

[para 21] The Applicant addressed the question of the alternatives that were available to his managers to monitor his productivity and gauge the way he was structuring his priorities. He said that it would have been simple to review the 'trouble tickets' – documents that apparently existed relative to the handling of particular information technology problems – to determine who handled the bulk of the problems

and how they were handled. He also noted that his supervisor sat just a few feet away from his workspace and could observe his computer screen at any time. No one from the Public Body contradicted or responded to the Applicant's suggestion that the logged 'trouble tickets' could have been reviewed to determine his level of productivity and how he was spending his time.

[para 22] The evidence also showed that the software was installed only on the Applicant's computer, and not on those of the other employees who were responsible for similar tasks.

Analysis

[para 23] In my view, the Public Body has failed to demonstrate its authority to collect personal information under section 33(c) in this case. The keystroke information that was collected in this case was not information necessary for management of the employee, and thus section 33(c) did not provide authority for the Public Body to collect it.

[para 24] First, the Public Body argued that it undertook the collection because it had concerns the Applicant was using his computer for his personal pursuits, and that he was not being sufficiently productive. However, the evidence does not, in my view, establish the basis for these concerns, nor am I convinced that the Public Body actually had such concerns. The Director did not explicitly mention the issue of personal use; neither did she say she had any basis for thinking the Applicant was insufficiently productive.

[para 25] Second, even if the managers in this case had these concerns, or concerns about how the Applicant was prioritizing tasks, the method of collection that was chosen collected information that was not necessary for managing the Applicant as an employee. The information collected by the keystroke logger was information as to everything the Applicant did on his computer. In my view it was not necessary for the Public Body's managers to know every single thing the Applicant did on his computer in order to know if he was being productive or prioritizing his work according to their instructions. They did not need all this information, or information of this particular type, in order to manage him effectively.

[para 26] The Applicant provided uncontradicted evidence that the 'trouble ticket' system was a means by which to determine his productivity that fell far short of knowing every key he struck on his computer. Whether or not the particular program for "trouble ticket" logging that had been installed was adequate for this purpose, I believe that it would be possible to implement a computer-based method for gauging productivity of information technology workers relative to 'troubleshooting' tasks. Further, even just asking the Applicant for an account of his productivity, or how he was using his time, would have been a good first step, and far less intrusive. If a more systematic approach was desirable, performance measures and performance reviews based on such measures are widely-accepted management tools that could also have been applied in this case.

[para [para 27] As well, I note the Applicant's concern that he had been given permission to do personal internet banking on his computer in non-working time, and that this personal information was also being collected. There was clearly no justification whatever for collecting this personal information. The failure to resolve this issue before instituting the collection indicates that the action was not well-thought-out. Banking information was not related directly to management of the Applicant as an employee, and collection of this category of information was not in conformity with the Act.

[para 28] Finally, I note that while there were other information technology employees in the organization, they were not similarly monitored. This lack of even-handedness further undermines the Public Body's explanation for the collection.

[para 29] There may be some circumstances in which information that is collected by means of keystroke logging software is necessary for the purpose of effective employee management within the terms of section 33(c). However, because such programs involve a continuous monitoring of an employee's working life, they are highly intrusive into the privacy of employees. Where such programs are employed surreptitiously, the encroachment on an employee's personal privacy is even greater.

[para 30] In my view, information collected by keystroke logging software becomes "necessary" within the meaning of section 33(c) of the Act only when there is no less intrusive way of collecting sufficient information to address a particular management issue. Furthermore, surreptitious use of the software will result in "necessary" information only where forewarning employees that such a program will be used means that information needed for management cannot be collected.

[para 31] For example, if keying in text were the primary task for a job, and speed and accuracy were agreed performance measures, the use of keystroke logging software might be justified. The information could be "necessary" in such a case because other indications of performance would not be as effective or efficient. However, there would be no reason not to inform the employee that such a measure would be taken, either consistently or periodically. To give another example, if an employer had reason to believe an employee was using office equipment to surf the net on office time, information collected by keystroke logging software could become "necessary". However, this would be only after the employer had developed and conveyed to the employees a written "accepted use policy" relative to their computers.

[para 32] With respect to surreptitious use of keystroke logging software, this is a form of surveillance. In my view information collected through surreptitious use would be considered "necessary" within the meaning of section 33(c) only when the information needed for managing could not be obtained by other means. For example, information from surreptitious use of keystroke logging software relative to a particular employee could be "necessary" where an employer had reason to believe that fraud was being committed by the employee using office-supplied information technology equipment. I might add that the use of such software for "law enforcement purposes" may be

permissible under section 33(b) of the Act, but a discussion of that is beyond the scope of this case.

[para 33] In this case, no circumstances such as those just described existed. There were alternate means by which the managers could address any concerns they had about the Applicant's productivity, use of his working time, or way of prioritizing his tasks. The surreptitious aspect of the information collection made it even less justifiable. Therefore the information collected by the chosen method was not necessary information within the terms of section 33(c) of the Act, and the Public Body did not have authority to collect it under that section.

[para 34] Having found that the personal information collected through keystroke logging was not necessary for an operating program or activity of the Public Body, I do not find it necessary to decide if the personal information related directly to its operating program or activity.

Issue C: Did the Public Body collect the Applicant's personal information in accordance with section 34 of the Act?

[para 35] Section 34 is premised on a collection of information that is permitted under section 33. Because I have found that the collection was not permitted under section 33, I do not need to decide this question.

Issue D: Did the Public Body protect the Applicant's personal information as required by section 38 of the Act?

[para 36] The Applicant suggested in his submission that the keystroke logging program was insecure. He said that he had found some of the information collected by the keystroke logger "sitting in a 'folder' on the Windows server" and that this information was neither password-protected nor encrypted. He said he had been able to view it without taking any extraordinary steps.

[para 37] However, the Applicant's supervisor contradicted the Applicant's assertions as to the unprotected status of information collected by the keystroke logger. He said that all such information was both password protected and encrypted. He explained that the folder that had been viewed by the Applicant must have been one pertaining to his [the Supervisor's] own information that he had unencrypted and then converted to an 'html' text file in the process of testing the program.

[para 38] Given the lack of certainty about the reason for the Applicant's ability to read the unencrypted folder, I am unable to conclude that the Applicant's personal information was not adequately protected after it had been collected.

Issue E: Did the Public Body have the authority to use the Applicant's personal information under section 39 of the Act?

[para 39] The Public Body provided evidence that no member of its staff ever viewed or used the Applicant's personal information collected through the keystroke logger. The Applicant provided no evidence to the contrary. Therefore I find it was not used, and I do not need to decide if the Public Body had authority to use it.

Issue F: Did the Public Body violate section 91 of the Act?

[para 40] This was not among the list of issues in the Notice of Inquiry, but was raised by the Applicant in his submission. The Applicant suggested he was dismissed as a result of his complaint to this office.

[para 41] Section 91 creates an offence. The offence provisions under the Act must be prosecuted before the Provincial Court of Alberta. I do not have jurisdiction to deal with an offence under section 91.

[para 42] In any event the evidence established that the Applicant was dismissed by the Public Body on a date that was earlier in time than the Public Body's receipt of notice of the Applicant's complaint to this office. Thus it cannot be said that the Public Body took adverse employment action against the Applicant as a result of his complaint.

[para 43] Further, section 91 is directed against employer actions resulting from an employee's disclosure of information in accordance with the Act. The provision has no bearing on employer actions that arise from complaints brought under the Act.

IV. ORDER

[para 44] I make this Order under section 72 of the Act.

[para 45] I conclude that the Public Body collected the Applicant's personal information in contravention of section 33 of the Act. However, as the contravention has now ceased, I do not need to order the Public Body to cease collecting the Applicant's personal information.

[para 46] I conclude the Public Body did not violate section 38 or section 39 of the Act. An offence under section 91 is not within my jurisdiction.

Frank Work, Q.C.
Information and Privacy Commissioner