Order F07-18

UNIVERSITY OF BRITISH COLUMBIA

Catherine Boies Parker, Adjudicator

September 24, 2007

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Summary: The complainant, a former employee of UBC, was terminated from his employment based, in part, on allegations regarding his personal internet use. UBC had utilized log file reports and computer spyware for the purposes of tracking the complainant's internet activity and the complainant alleged this collection of his personal information was contrary to s. 26 and s. 27. UBC's policy allowed for some personal internet use and the complainant had never tried to hide his internet activity from his supervisor. The collection was not authorized under s. 26 because it was not necessary for the management of the complainant's employment, given that UBC had never raised any concern about the complainant's internet activity with the complainant. The manner of collection was also contrary to s. 27, since the information was required to be directly collected from the complainant and was in fact directly collected from him, but the requirements of advance notice were not met. As a result, both the collection of information and the manner of collection were contrary to UBC's legal obligations. The complainant asked for an order that the records containing the disputed information be destroyed. The arbitrator hearing the complainant's termination grievance had ordered the records produced at the grievance hearing. While in most cases of improper collection an order for destruction or requiring UBC not to use the documents would be issued, in this case, given the outstanding production order of the arbitrator, UBC was ordered not to make any use of the information other than as required to enable the grievance arbitrator to make a decision on admissibility.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(2), 26(c), 27(1)(b), 27(1)(c)(ii), 27(2), 27(3)(b)(i), 27(3)(b)(ii), 27(3)(c), 33, 33.2(c), 42(2) , 52, 58(3), Schedule 1.

Authorities Considered: B.C.: Order No. 194-1997, [1997] B.C.I.P.C.D. No. 55; Order F07-10, [2007] B.C.I.P.C.D. No. 15. **Alta.:** Order F2005-003, [2005] A.I.P.C.D. No. 23. **Ont:** Investigation I94-005P, [1994] O.I.P.C. No. 450; Privacy Complaint No. MO-MC-030035-1, [2004] O.I.P.C. No. 261; Order MO-2225. **P.E.I.:** Order No. PP-06-001.

Cases Considered: *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502; *X v. Y*. [2002] B.C.C.A.A.A. No. 92; *Extra Foods v. United Food and Commercial Workers' International Union Local 1518* [2002] B.C.C.A.A.A. No. 377; *British Columbia Maritime Employers' Assn*. (2002), 70 C.L.A.S. 74; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* [1995] 2 S.C.R. 739; *Re Greater Vancouver Regional District and G.V.R.D.E.U*. (1996) 57 L.A.C. (4th) 113.

1.0 INTRODUCTION

[1] This order addresses a complaint against the University of British Columbia ("UBC") regarding its collection of information relating to the complainant, a former UBC employee. The complainant's managers conducted an investigation into the complainant's personal internet use during work hours, including the installation of software which surreptitiously tracked the complainant's internet activity. The complainant was terminated from his employment, in part on the basis of his internet use. His union has grieved that termination.

[2] The complainant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to information relating to his job performance and computer usage. UBC responded by granting the complainant access to, among other things, the reports generated from his computer relating to his internet use. The complainant alleges that the collection of information regarding his internet use was not authorized under s. 26 of FIPPA. The complainant alleges, in the alternative, that if the collection of information was authorized, the manner of collection was contrary to s. 27 of FIPPA.

[3] The complainant requests an order for the destruction of the information that was collected. The complainant recognizes that such an order would compromise UBC's ability to defend against the termination grievance, and asserts that because of this impact such an order would have a strong deterrent effect.

[4] UBC argues that it was authorized to collect the information under s. 26 and that the manner of collection complies with s. 27 of FIPPA. UBC submits that, in any case, an order for destruction of the records would be unprecedented and highly prejudicial to UBC.

2.0 ISSUES

[5] The issues before me in this case are:

1. Was some or all of the electronic information at issue the complainant's personal information as defined in Schedule 1 of FIPPA?

2. If some or all of the electronic information was the complainant's personal information, did UBC have authority under s. 26 of FIPPA to collect the personal information?

3. If UBC had authority under s. 26 to collect the personal information, did UBC collect the complainant's personal information in a manner authorized by s. 27 of FIPPA?

4. If UBC is found to have contravened s. 26 or s. 27 of FIPPA, what is the appropriate remedy?

[6] Section 57 of FIPPA is silent on the burden of proof in relation to ss. 26 and 27. In the absence of a statutory burden of proof, it is incumbent upon both parties to bring forward evidence in support of their positions.

3.0 DISCUSSION

[7] **3.1 Background**—The complainant, an engineering technician, was provided with a computer to which he had virtually exclusive access. The computer was located in the workshop the complainant shared with his supervisor. The complainant used the computer for work-related duties such as business email, spreadsheets, and internet-based research of particular problems.[1] The testimony of UBC representatives was that these computer-related tasks should have required approximately 10% of the complainant's work time.[2]

[8] The complainant also used his computer for personal uses including personal email and banking.[3] The complainant did not hide his personal computer use from his supervisor.[4] The complainant's supervisor noted the complainant's personal internet use on several occasions.[5] However, no

[1] Complainant's initial submission, para. 16; Complainant's affidavit, para. 13.
[2] Supervisor's affidavit, para. 5.
[3] Complainant's initial submission, para. 16; Complainant's affidavit, para. 13.
[4] Complainant's initial submission, para. 16; Complainant's affidavit, para.13; Supervisor's affidavit, para. 6.
[5] Supervisor's affidavit, paras. 9 and 10, Exhibits "A" and "B"; Complainant's initial submission, para. 12.

concerns were ever expressed to the complainant regarding this issue prior to the installation and utilization of software in December 2004 to track and report on this use.[6]

[9] UBC's Responsible Use of Information Technology Facilities and Services policy states:

> Computer IDs, accounts, and other communications facilities are to be used for authorized purposes. Incidental personal use is acceptable as long as it does not interfere with use of the facility for its intended purpose and, in the case of employees, as long as it does not interfere with his or her job performance.[7]

[10] The complainant first became aware of UBC's policy on personal internet use on or after January 28, 2005, when a shop steward asked him whether UBC had ever drawn his attention to the policy.[8]

[11] The complainant was originally hired as a part-time Engineering Technician 2. The Administration Manager of his Department deposes that she began conducting a "performance evaluation" of the complainant in the fall of 2003, and asked the complainant's supervisor to provide her with comments.[9] A November 18, 2003 email from the supervisor to the Administration Manager suggests that there were some problems with the complainant's performance. However, the email concludes, "Frankly, he is not so bad at all when compared with other technicians in other departments. He is also a good man, friendly, easy to be with. But we have too many jobs to do, I hope he can do better."[10]

[12] The Administration Manager deposes that the complainant's supervisor continued to advise her in early 2004 that the complainant was having difficulty completing tasks within a reasonable period of time. She states that she was unclear whether this was as a result of job performance issues, or whether the reason for the delays was his part-time status. The Administration Manager deposes that for this reason, the complainant was offered full-time employment. She states:

> I told the complainant that I was concerned about the length of time it was taking him to complete his tasks and that the full-time appointment was for the express purpose of allowing him to complete his repairs more quickly. I also told him that I would be expecting more of him as he would be working without direct supervision and would be 100% responsible for

[6] Complainant's affidavit, para. 17.
[7] Complainant's affidavit, Exhibit "2"; Administration Manager's affidavit, para. 10, and Exhibit A".
[8] Complainant's affidavit, para. 15.
[9] Administration Manager's affidavit, paras. 5 and 12(b).
[10] Administration Manager's affidavit, Exhibit "C".

> electrical repairs in the department. I was clear that [his supervisor] would no longer be assisting the complainant with completing repairs. The complainant responded by accepting full-time employment, but asked that he be reclassified to Engineering Technician 3 (with a resultant pay increase) due to the increased responsibility. I agreed to this request.[11]

[13] After his full-time appointment, the Administration Manager began to take a more active role in monitoring the complainant's performance. In August 2004 she undertook another review, which included asking him to provide the job requests he had been working on since the beginning of June.[12] The email which requested the job requests does not mention any concerns about the complainant's performance.[13] The Administration Manager deposes that, based on her experience, she believes that the complainant did not effect many of the repairs he was required to do in a timely manner.[14]

[14] The complainant successfully completed his trial period of employment in his new position on or about August 31, 2004. At no time during the trial period did the supervisor or UBC draw to the complainant's attention any concerns about the complainant's "skills", "production" or hours of work.[15]

[15] On November 9, 2004 the Administration Manager met with representatives of the Department of Human Resources to review concerns about the complainant's job performance and timekeeping.[16] The complainant was not informed about these concerns.

[16] On December 7, 2004, the Administration Manager sent an email to the complainant referring to a technical problem involving a lab user. She stated:

> I appreciate that this has been fixed but in the future this should be dealt with immediately and not left for several days. [The lab user] informed you of the problem on Wednesday of last week and it should not have taken this long to correct the problem.
>
> If you are unsure of how to proceed with such a problem in the future please consult with Sean and let me know.[17]

[17] The Administration Manager deposes that the lab user advised her that as a result of the technical problem, there were serious impacts on the lab user's

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[11] Administration Manager's affidavit, para. 12(d).
[12] Administration Manager's affidavit, para. 12(g).
[13] Administration Manager's affidavit, Exhibit "D".
[14] Administration Manager's affidavit, paras. 12(h), 12(o), 12(r) and 12(w).
[15] Complainant's initial submission, para. 17; Complainant's affidavit paras. 11 and 16.
[16] Administration Manager's affidavit, para. 12(t); Complainant's initial submission para. 21.
[17] Administration Manager's affidavit, Exhibit "Q".

research. The Administration Manager says that this was "the straw that broke the camel's back" and that she decided to investigate.[18]

[18] The complainant takes issue with many of the facts set out in the Administration Manager's affidavit. He states that the impacts on the lab user's research were the effect of a technical breakdown which occurred on December 26, 2004, during the complainant and his supervisor's holidays.[19] I note that in an email dated December 6, the complainant set out the steps he had taken the previous week to address the problem.[20]

[19] In any case, on or about December 9, 2004, the Administration Manager decided to investigate the complainant's behaviour. She states that she considered two possibilities—that the complainant had not been working his full shift and that he had been spending too much time accessing non-work-related web sites during paid working hours. She asked the complainant's supervisor "to use appropriate measures to determine whether the complainant was spending an excessive amount of time accessing the internet on University time."[21]

[20] The Administration Manager's evidence is that the complainant's supervisor presented her with a report on December 9, 2004, showing that the complainant had visited a large number of non-work-related websites between August 3, 2004 and December 9, 2004 ("the Log File Report").[22]

[21] In his affidavit, the complainant's supervisor deposes that he printed the Log File Report from the computer used by the complainant. A log file, he explains, is a file on the hard drive of the computer that tracks the web-sites visited by the computer. The supervisor de-coded the file, exported it into a readable format and printed it out. The supervisor deposes that the times indicated in the reports are actually Greenwich Mean Time, so eight hours must be deducted for Pacific Standard Time. He states that, accordingly, while it appears that the report was generated on December 10, 2004, it was actually December 9, 2004.[23]

[22] The Log File Report consists of a series of computer printouts. The first thirteen pages of the report show individual entries, each associated with a date, the complainant's email address and a website. This portion of the report covers the period from November 16, 2004 to December 10, 2004.[24] Part way down the

[18] Administration Manager's affidavit, paras. 12(z), 12(aa) and 13.
[19] Complainant's reply submission, para. 1.
[20] Administration Manager's Affidavit, Exhibit "Q".
[21] Administration Manager's Affidavit, paras. 13 and 14.
[22] Administration Manager's Affidavit, para. 15. It is not clear whether the document was printed all at once or at different times, however, for simplicity I will refer to the whole document as one report.
[23] Supervisor's Affidavit, paras. 12 and 13
[24] Records, pages 470070-470083.

13th page the Log File Report changes. It no longer lists the complainant's email. It has one entry from September 1, 2004. The entries then run, in reverse chronological order, from February 17, 2004 to March 13, 2004, with isolated entries from other dates. These isolated entries are again associated with the complainant's email.[25] Beginning on the 18th page, the entries are again chronological, running from December 13, 2004 to December 15, 2004. This last portion of the log does not refer to the complainant's email.[26]

[23] The Administration Manager states that while the Log File Report showed what sites were visited, it did not demonstrate the length of time spent on each site. She asked the complainant's supervisor to "check to see how much time the complainant was spending on these websites during working hours."[27]

[24] The complainant's supervisor deposes that he researched various ways of doing this and decided to use Golden Eye Spy Software ("GESS"). The complainant's supervisor deposes that the GESS was used to monitor the computer's activity from December 13, 2004 to January 17, 2005. The GESS took "screenshots"—detailed electronic images of what appears on the computer screen—which were later printed out ("the GESS Reports").[28]

[25] Roger Depeiri, an electrician at UBC and union shop steward, deposes that he downloaded the same trial version of GESS which was used to monitor the complainant's computer. The default settings of the GESS record nine discrete computer functions: Keystrokes; Web Sites; Window Title; Screenshots; Startup/Shutdown; File/Folder; Exe File path; Message, and Clipboard. When printing the records, a user can choose to print some or all of the information collected. Mr. Depeiri deposes that the default setting for screen shots with the GESS is the collection of a record every two minutes until there has been five minutes of inactivity on the monitored computer. He states that a review of the records indicate that this default setting was likely being used.[29]

[26] The supervisor states that he disabled the keystroke tracking function as he did not want to "record any of the Complainant's passwords, bank account numbers or other sensitive information that was not necessary for the University's investigation."[30] The GESS Reports have information regarding all of the following functions: Web Sites; Window Title; Screenshots;

[25] Records, pages 470083-470087.
[26] Records, pages 470088-470120
[27] Administration Manager's affidavit, para. 15.
[28] Supervisor's affidavit, para. 16.
[29] Depieri affidavit, paras. 4-6.
[30] Supervisor's affidavit, para. 15; UBC's initial submission, para. 7.

Startup/Shutdown; and File/Folder. Because of the use of the screenshot function, the spyware collected personal correspondence, the complainant's bank account number, the complainant's bank transfers of monies, and bank account summaries.[31]

[27] After reviewing the GESS Reports, the Administration Manager met with the complainant and told him that he was the subject of an investigation regarding his internet use and absence from work.[32] After a second disciplinary meeting, the complainant was suspended.[33] It was at these meetings that the complainant first became aware that his use of the computer was of concern and that UBC had extracted information about his internet use, including using the GESS.[34]

[28] The complainant was initially suspended with pay pending the outcome of the investigation. He was ultimately terminated for cause on February 28, 2005. The termination letter states that he was terminated for "repeated and excessive lateness, repeated failure to perform the work for which [he] was being paid, dishonesty, breach of trust and repeated theft of time".[35] The complainant's union has grieved that dismissal.[36] The times allegedly spent on non-work-related sites are set out in the complainant's termination letter,[37] as well as a report generated by the Administration Manager (the "Summary Report").[38] (The termination letter and Summary Report are collectively referred to below as the "Derivative Records".) UBC intends to rely on the Log File Report and the GESS Reports at the arbitration of the termination grievance.[39]

[29] The complainant applied under FIPPA to access those records relied upon by UBC in its decision to terminate his employment. UBC provided the complainant with those records, including the Log File Report, the GESS Reports, and the Derivative Records.[40] The complainant's counsel wrote the Freedom of Information Coordinator at the Office of the University Counsel, setting out a complaint. Counsel for the complainant argued that the collection of information about the complainant was contrary to s. 27 of FIPPA, and requested that UBC destroy all of the personal information it had collected inappropriately. The letter states that the information at issue was collected through "observation of the Complainant's Workshop arrival and departure times, downloads of

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[31] Complainant's initial submission, para. 25.
[32] Administration Manager's affidavit, paras. 19 and 20, Exhibit "T" and "U"; Complainant's affidavit, para. 18.
[33] Administration Manager's affidavit, para. 20 and 21; Complainant's affidavit, para. 18
[34] Complainant's initial submission, para. 27; Complainant's affidavit, para. 18.
[35] Complainant's affidavit, para. 18, Exhibit 3".
[36] Complainant's affidavit, para. 19; UBC's initial submission, para. 12.
[37] Complainant's affidavit, Exhibit "3".
[38] Complainant's affidavit, Exhibit "5"; Records, pages 470066-470069.
[39] UBC's initial submission, para. 12.
[40] Complainant's affidavit, paras. 20-22 and Exhibits "4" and "5".

websites visited and the installation and operation of the Golden Eye Software."[41] UBC responded on June 30, 2005, stating that it believed it had collected the complainant's information in accordance with ss. 26 and 27 of FIPPA and refusing to destroy it.[42]

[30] On July 18, 2005, counsel for the complainant filed a "Request for Review/ Privacy Complaint" form with this Office. The complainant's counsel summarized the complaint as follows:

> The use of "spyware" on the complainant's workplace computer was a collection of personal information in contravention of s. 26 or s. 27 of FOIPPA."

[31] By letter dated November 22, 2006, after submissions were received in this inquiry, counsel for UBC advised this Office that an arbitrator had been appointed to hear the complainant's termination grievance, and that UBC would be seeking an order from the arbitrator compelling UBC to preserve the documents which were the subject matter of the complaint to this Office. Counsel for UBC provided this Office with a copy of his letter to the arbitrator requesting a preliminary hearing to address this issue. Also on November 22, 2006, counsel for the complainant wrote to this Office, stating that it would be "untimely, prejudicial and in contravention of natural justice if UBC's November 22 letter, or any preliminary decision of the arbitrator, was to form part of the record for the purposes of the commissioner's deliberations."

[32] Counsel for UBC wrote to this Office again on February 5, 2007, stating that the preliminary hearing before the arbitrator regarding the order for preservation of documents would be heard on March 7, 2007. Counsel for UBC states "We would be grateful if the Privacy Commissioner continues to hold-off issuing a decision in this matter until the Arbitrator issues his ruling regarding the University's request for the preservation order."

[33] On February 5, 2007, counsel for the complainant wrote to this Office again stating its position that any correspondence relating to the arbitrator should not be placed before the Commissioner. The complainant's counsel states that any decision to hold the inquiry in abeyance pending the outcome of some other matter should properly be the subject to submissions and argument by the parties, and stating that counsel would oppose holding the inquiry in abeyance.

[34] On March 21, 2007, counsel for UBC forwarded to this Office a copy of the arbitrator's decision, which required the production of the records in dispute at the hearing of the termination grievance.

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[41] Complainant's affidavit, para. 23 and Exhibit "6".
[42] Complainant's affidavit, para. 24, and Exhibit "7".

[35] **3.2 Preliminary Issue: the Nature of the Inquiry**—Section 52 of FIPPA provides that a person who makes a request for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act that relates to that request, including any matter that could be the subject of a complaint under section 42(2). Section 42(2) provides that the commissioner may investigate and attempt to resolve complaints that, among other things, personal information has been collected, used or disclosed by a public body in contravention of Part 3.

[36] Section 42(1)(b) provides that an order described in s. 58(3) may be made "whether the order results from an investigation or audit under paragraph (a) or an inquiry under s. 56." While this matter was originally framed as a complaint, it has proceeded as an inquiry under Part 5 of FIPPA. The inquiry process has provided the parties with a full opportunity to address the issues, and I am satisfied that the evidence filed provides a sufficient basis for making an order under s. 58(3).

[37] **3.3 Preliminary Issue – the Scope of the Inquiry**—The complainant raised a preliminary objection regarding the scope of the inquiry. The Notice of Written Inquiry, issued on February 17, 2006, states the issue as

> Whether the public body contravened ss. 26 and 27 of the Act when it used computer spyware to collect information about the complainant's use of his computer workstation.

[38] The Portfolio Officer's Fact Report, also issued on February 17, 2006, states the issue as "whether the public body contravened ss. 26 or 27 of the Act when it used the GESS to collect information about the complainant's use of his computer workstation".

[39] The complainant raised a concern that by limiting the inquiry to UBC's use of the GESS, the Fact Report precluded consideration of the Log File Report. The complainant submits that the extraction and downloading of the information in the Log File Report "also manifests UBC's use of spyware as that phrase was intended in the Complainant's Complaint."[43]

[40] The complainant's submissions address both the Log File Report and the GESS Reports. In its initial submissions, UBC defines "Records" as both the GESS Reports and the Log File Report.[44] UBC addresses all of these records in its submissions.

[41] The issue as defined in the Notice of Written Inquiry is broad enough to encompass the information in both the Log File Report and the GESS Reports.

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[43] Complainant's initial submission, paras. 7 and 8.
[44] UBC's initial submission, para. 12.

I am satisfied that both parties have had an opportunity to fully address both of these types of records, and that it is proper for me to make a determination regarding them.

[42] **3.4 Is the Information at Issue Personal Information Under FIPPA?**—In order to come within the definition of personal information set out in Schedule 1 of FIPPA, the information must be

(a) recorded information,
(b) about an identifiable individual,
(c) other than contact information.

[43] The information about the complainant's internet usage as recorded in the Log File Report was initially recorded in an electronic form on the hard drive of the computer. The complainant's supervisor then extracted that information and printed it out in paper form. The information in the GESS Reports was collected by means of the GESS, which stored the information electronically and was then used to produce paper records.

[44] UBC asserts that the information in the Log File Report did not involve any collection by UBC. UBC asserts that the computer user generated the information when the computer accessed the internet. The report, it is asserted, is simply a printout and is not a "collection" in and of itself.[45]

[45] I note that the definition of "record" in FIPPA excludes "a computer program or any other mechanism that produces records." I make no finding regarding whether the recording of the internet sites visited in the log file in the computer is, in itself, a collection of information for the purposes of FIPPA. However, the act of UBC management in extracting that information and printing out the Log File Report constitutes a collection of recorded information. The activities of UBC in utilizing the GESS clearly amount to a collection of recorded information.

[46] There are two aspects to the information collected in the records which are relevant to the question of whether the information is "about an identifiable individual". First, some of the information collected by the GESS screenshots consists of specific financial and other biographical information about the complainant. The screenshots provide details of the complainant's personal correspondence and banking information, including bank transfers of monies and bank account summaries. UBC concedes that to the extent that the records contain personal correspondence and banking records they are the complainant's personal information for the purposes of FIPPA.[46] I agree.

[45] UBC's initial submission, para. 24.
[46] UBC's reply submission, para. 7.

[47] UBC argues that the Log File Report and those portions of the GESS Report that do not include personal correspondence or banking information simply contain information about websites visited by a computer, and not about the complainant. UBC says that this information is not information about an identifiable individual.[47]

[48] UBC asserts that:

> [m]ost of the Records are not about an identifiable individual. Rather the Records are of websites visited. They do not identify the Complainant. The Records simply demonstrate whether the computer in the Department's workshop was being used for non-work related purposes during times when the Complainant was being paid by the University to work. The Records were collected, and the Complainant was interviewed, to determine the amount of time that the Complainant was spending on non-work related tasks.[48]

[49] The last sentence in the passage quoted above demonstrates that in fact UBC's position is that the information in the records at issue is indeed about an identifiable individual, namely the complainant. The whole purpose of the collection was to demonstrate what the complainant was doing. It was not to simply gather information about how the computer itself was being used, without regard to who was using it. Many of the Log File Report entries include the complainant's email address. In addition, the computer which was being tracked was used almost exclusively by the complainant. This further demonstrates that the complainant is identifiable.

[50] It is true that many parts of the GESS Report and the Log File Report do not identify the Complainant by name. However, UBC has taken the position, in its termination of the complainant, that these records document the complainant's activities on the internet. UBC made the decision to terminate on the basis that the information provided by the reports was about the complainant.[49] This is inconsistent with UBC's current assertion that the records do not contain information about the complainant.

[51] There has been no suggestion that the information at issue is only "contact information" as defined in FIPPA. I find that the information collected was personal information for the purposes of FIPPA.

[52] **3.5 Was UBC Authorized to Collect the Information Under Section 26?**—Section 26 provides authority for the collection of personal information by a public body. UBC relies on s. 26(c) which provides that a public

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[47] UBC's initial submission, paras. 17 and 22.
[48] UBC's initial submission, para. 17.
[49] Complainant's initial submission, para. 51.

body may collect personal information if "that information relates directly to and is necessary for an operating program or activity of the public body."

[53] The complainant accepts that UBC's management of its human resources generally, and workplace behaviour in particular, is part of an operating program or activity of UBC, and that it may be necessary to gather some personal information in order to manage perceived employment shortcomings.[50] However, the complainant submits that the surreptitious collection of personal information in this case was not necessary for the management of the complainant's employment relationship with UBC because UBC had available to it less intrusive means to manage the complainant's employment.[51] The complainant asserts that UBC could have inquired directly with him regarding the nature and extent of his computer use. The complainant notes that providing him with notice of concerns would have provided an opportunity to correct shortcomings and maintain a sound employment relationship.[52]

[54] UBC says it is a fundamental right of every employer to investigate when it reasonably believes an employee is engaging in misconduct in the workplace.[53] UBC refers to numerous decisions in which the collection of information in the course of workplace investigations has been held to be authorized under s. 26(c) or similar provisions. For example, in Order No. 194-1997, Commissioner David Flaherty held that the collection of the names of those individuals who filed a harassment complaint, and of written notes of interviews with those complainants, was authorized under s. 26.[54] UBC also refers to a case in which the Ontario Information and Privacy Commissioner found that collection of information, including the views of co-workers about an employee's behaviour, a psychiatric assessment of the employee and his work situation, and information about the employee's job performance, fell within the Ontario equivalent of s. 26(c).[55]

[55] UBC argues that the test for whether information is necessary for the purposes of s. 26(c) should be the same test which is utilized by labour arbitrators in British Columbia in determining whether evidence obtained by means of surreptitious surveillance is admissible.[56] UBC refers to a paper presented by Commissioner Loukidelis, which explains the benefit of ensuring consistency between the arbitral approach to employee privacy and the

[50] Complainant's initial submission, paras. 67 and 68.
[51] Complainant's initial submission, paras. 70, 71, 74, 75 and 78.
[52] Complainant's initial submission, paras. 72 and 74.
[53] UBC's initial submission, para. 33.
[54] [1997] B.C.I.P.C.D. No. 55.
[55] *A Community College*, Investigation I94-005P, [1994] O.I.P.C. No. 450.
[56] UBC's reply submission, para. 35.

interpretation of privacy laws.[57] UBC argues that the test applied by arbitrators is based on reasonableness and consists of the following inquiries:

> 1. Was it reasonable, in the circumstances, to request surveillance?
>
> 2. Was the surveillance conducted in a reasonable manner?[58]

[56] UBC argues that the information should be considered necessary if there is some "reasonable and rational connection between the collection of the information and the recognized activity of the University."[59]

[57] UBC and the complainant both rely on Alberta Order F2005-003. In that case, Alberta's Information and Privacy Commissioner accepted 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 purposes of managing."[60] In that case, the Commissioner found that it was not necessary for the Employer to utilize keystroke logging software. The Commissioner found that concerns about productivity did not motivate the installation of the software, and that there was only one incident of personal internet use that had been noted by the Employer.

[58] The Commissioner noted that, in some cases, it may be appropriate to track employees' computer use:

> 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. [61]

[59] UBC argues that this is just such a case—it had reason to believe that the complainant was using office time to surf the net, and it had an acceptable use policy.[62] UBC also argues that no policy is required to deal with obvious employee misconduct. It asserts that the fact that the complainant apologized for his conduct in the disciplinary meeting demonstrates that he was aware of the wrongfulness of his conduct.[63]

[60] UBC argues that, in this case, it was both reasonable and necessary for it to utilize the software to determine the amount of the complainant's internet

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[57] *Arbitrators & Privacy Commissioners - Why they Should Listen to Each Other;* Insight Conference "Privacy Laws & Effective Workplace Investigations", Calgary, May 4 and 5, 2004,
[58] UBC's reply submission, para. 27.
[59] UBC's reply submission, para. 23.
[60] [2005] A.I.P.C.D. No. 23, para. 12.
[61] At para. 31.
[62] UBC initial submissions, paras. 47 and 48; UBC reply submissions para. 18.
[63] UBC reply submission, para. 18.

use.[64] UBC states that it was necessary to utilize the covert surveillance because any direct confrontation with the complainant, or any indication that UBC intended to monitor his computer use, would have resulted in the complainant modifying his behaviour.[65] UBC refers to cases involving abuse of sick leave, and says that the employer is not required to destroy its own investigation by alerting the target of an investigation.[66]

[61] In order to fit within s. 26(c), information must meet two requirements. It must relate directly to an operating program or activity of the public body, and be necessary for that program or activity.

Does the information relate directly to the program or activity of the public body?

[62] Information regarding whether the complainant was accessing non-work related websites during hours for which he was being paid is information which is directly related to UBC's management of its human resources. As a result, the information in the Log File Report is directly related to the management of the complainant's employment.

[63] Information which reveals the complainant's specific activities on non-work related websites is not, in this case, directly related to UBC's human resources activities. As UBC notes, this is not a case involving an allegation that an employee accessed inappropriate material on the internet. The specifics of the complainant's banking transactions, or his personal correspondence, are not relevant to any program or activity of UBC's. The GESS Report, therefore, has some information that is relevant to managing the complainant's employment, and some information which is not. In Alberta Order F2005-003, the keystroke monitoring software also collected the employee's personal banking information. The Commissioner held that the employer did not need all of the information collected, or information of that particular type, in order to manage the employee effectively. The Commissioner states:

> 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 directly related to management of the Applicant as an employee, and collection of this category of information was not in conformity with the Act.[67]

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[64] UBC reply submission, para. 16.
[65] UBC initial submission, para. 48
[66] UBC reply submission, paras. 21, and 29-31.
[67] At para. 27.

[64] In this case, a review of the Log File Report would have demonstrated to UBC that the complainant used his computer for personal banking and correspondence. While the complainant had not been given specific permission to use his computer for personal banking, there was no prohibition on such use and UBC was aware of this use and raised no objection to it. In these circumstances, UBC ought to have been aware that taking screenshots every two minutes would lead to the collection of information not directly relevant to the complainant's employment relationship.

Is the information necessary for an operating program or activity of the public body?

[65] Even if the information collected by the screenshots was relevant to the management of the complainant's employment, I find that it was not necessary. The rationale provided by UBC for utilizing the GESS was that the Log File Report did not provide sufficient information to determine the length of time spent by the complainant on non-work-related internet sites. The complainant takes issue with this assertion. According to the complainant, the first report from the GESS program was for December 17, 2004. However, in the discussion leading up to the termination, the complainant was told that UBC could determine the amount of time he spent on non-work related internet sites on December 13 and 14. The complainant asserts that this information could only have come from the Log File Reports.[68]

[66] Even if it was necessary to use the GESS software to determine the amount of time spent by the complainant on non-work related website, I find that this information could have been obtained without the use of the screenshot function. The tracking of websites and windows titles would have produced sufficient information to determine the length of time the complainant spent on each site, as well as the level of interactive use. As a result, I find that the collection of the information by the use of the screenshot function of the GESS program was not necessary for any program or activity of UBC, and that its collection was not authorized under s. 26(c).

[67] As noted above, the information collected by means other than the screenshots is related to the complainant's employment relationship in that it is information about whether the complainant was utilizing his paid work hours to access non-work related websites. As a result, I am required to consider whether the collection of this information is "necessary for an operating program or activity of the public body."

[68] The Ontario Court of Appeal recently discussed the Ontario equivalent of s. 26(c) in the *Cash Converters* case. The Court held:

[68] Complainant's reply submission, paras. 7, 8 and 25(c).

> Again, the jurisprudence developed by the Privacy Commissioner interpreting this provision is both helpful and persuasive of the proper approach to be taken by the courts as well. In cases decided by the Commissioner's office, it has required that in order to meet the necessity condition, the institution must show that each item or class of personal information that is to be collected is necessary to properly administer the lawfully authorized activity. Consequently, where the personal information would merely be helpful to the activity, it is not "necessary" within the meaning of the Act. Similarly, where the purpose can be accomplished another way, the institution is obliged to choose the other route.[69]

[69] Commissioner Loukidelis recently considered the definition of necessity in the British Columbia legislation in Order F07-10.[70] The Commissioner noted that, in interpreting FIPPA, its language is to be read in its grammatical and ordinary sense, and in its entire context, in harmony with FIPPA's scheme, its objective and the intention of the legislature. Section 2(1) articulates FIPPA's purposes. They are to make public bodies more accountable to the public and to protect personal privacy, including preventing the unauthorized collection and use of information.

[70] The Commissioner found that the collection of information by public bodies is to be "reviewed in a searching manner" and that "it is appropriate to hold them to a fairly rigorous standard of necessity while respecting the language of FIPPA."[71] However, he rejected the argument that personal information should be found to be "necessary" only where it would be impossible to operate a program or carry on an activity without the personal information. He held that, in considering whether information is necessary, one should consider the sensitivity of the personal information, the particular purpose for the collection and the amount of personal information collected, assessed in light of the purpose for collection. He also held that FIPPA's privacy protection objective is relevant in assessing necessity, noting that this statutory objective is consistent with the internationally recognized principle of limited collection.[72]

[71] Applying the principles set out above to this case, I find that the test is not whether it is impossible to manage the employment relationship without the collection of the disputed information. As a result, I agree with UBC that information may be considered necessary even if there are alternative means of managing the employment relationship. However, I do not agree that the existence of alternatives is not relevant to the assessment of whether the collection of information is necessary.

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[69] *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502.
[70] [2007] B.C.I.P.C.D. No. 15.
[71] At para. 48.
[72] At para. 49.

[72] The cases relied on by UBC do not exclude consideration of alternatives in the assessment of reasonableness; they simply find that an employer is not required to exhaust all other alternatives, regardless of the reasonableness of those alternatives.[73] Similarly, in the context of FIPPA, I find that the employer is not required to exhaust all possible other means of managing the relationship, without regard to whether those alternative means are reasonable or likely to succeed. However, if there are reasonable and viable alternatives to the surreptitious collection of personal information, that is a matter to be considered in determining whether the collection was necessary for the purposes of s. 26(c).

[73] I accept that in this case, unlike Alberta Order F2005-003, it was concern with the complainant's productivity which led UBC to collect the information. I also accept that in this case there was some evidence, from the complainant's supervisor, that the complainant was "surfing the net on company time."

[74] However, I note that in Alberta Order F2005-003, the Commissioner stated that a discussion with the employee on the topic of personal computer use, coupled with a warning if one was thought necessary, would have been a good first step for resolving the issue.[74] Similarly, in this case, the Administration Manager or the complainant's supervisor could have asked the complainant about the amount of time he was spending on the internet, and indicated some concern that this activity was interfering with his productivity.

[75] Given that the complainant had never taken any steps to conceal the extent of his internet use, there is no reason to believe that this means of addressing the problem would have been ineffective. The complainant's supervisor deposes:

> I would often walk in and out of the workshop while the Complainant was using the computer and (until December 22, 2004) could easily see the computer monitor while the Complainant was at the computer. The workshop is approximately 15' by 15' and, when in the workshop, I am never more than 10 feet from the computer used by the Complainant. When I observed the complainant on the computer I was in plain view of the Complainant and he knew I was there.[75]

[76] The supervisor took notes relating to the complainant's job performance, and on at least six occasions noted his personal internet use.[76] However, there is no suggestion that the topic was ever raised with the complainant.

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[73] *X. v. Y* [2002] B.C.C.A.A.A. No. 92; *Extra Foods v. United Food and Commercial Workers International Union Local 1518* [2002] B.C.C.A.A.A. No. 377.
[74] At para. 26. See also PEI Order No. PP-06-001.
[75] Supervisor's affidavit, para. 6.
[76] Supervisor's affidavit, para. 10, Exhibits "A" and "B".

[77] It is difficult to understand how the surreptitious collection of information about an employee's internet use can be necessary in the absence of any attempt to question the employee about his activity, especially when the supervisor was aware of that activity and the complainant knew the supervisor was aware of it. UBC states:

> If the University had asked the complainant about his non-work related computer use, or if the University had promulgated a policy dealing with software surveillance, that would have just tipped the Complainant off and he would have altered his conduct, thus depriving the University of finding out the truth behind his poor and untimely performance on the job.[77]

[78] UBC relies on *British Columbia Maritime Employers Assn*.[78] In that case, Arbitrator Munroe considered the admissibility of video surveillance evidence in a case where the grievor was terminated for a fraudulent claim of worker's compensation. Arbitrator Munroe notes that the employer's representative had attempted to speak with the grievor about his workplace accident, but had been told that he would only communicate with her in writing. He states that, for that reason, she did not think "her skepticism about the grievor's purported disabilities would be resolved by directly approaching and seeking to question him."[79] Arbitrator Munroe states

> I would observe, too, that direct confrontation cannot reasonably be required as an alternative to more covert investigative means where the core issue, demonstrably, is the integrity of the person who would be the one confronted.[80]

[79] *Maritime Employer's Assn.* involved very different facts than those which are before me in this case. Here, there is no evidence that the complainant was in any way deceitful about his internet use. In fact, UBC does not dispute that the complainant made no attempt to hide his personal internet use from his supervisor. As a result, this is not a case where the "core issue" is the integrity of the complainant. Rather, the "core issue" with respect to the management of the complainant's employment was whether his internet use was interfering with his work responsibilities. Where the employee is not suspected of fraud, but instead of acting in a manner contrary to the employer's policy, the management of the employment relationship involves ensuring compliance with the employer's policies, not attempting to "catch" the employee in contravention of policies of which he is not aware. In the circumstances of this case, it cannot be assumed that the simple step of speaking to the complainant about his personal internet use would not have been an effective means of addressing the problem.

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[77] UBC reply submission, para. 21.
[78] (2002), 70 C.L.A.S. 74.
[79] At para. 20.
[80] At para. 20.

[80] UBC argues that the fact that the complainant apologized for his behaviour at a disciplinary meeting demonstrates that he knew he was acting improperly.[81] I do not believe it is proper to attach any significance to the fact that the complainant, when faced with discipline, including termination, apologized. The uncontradicted evidence of the complainant is that he was not aware of UBC's policy on personal internet use until he attended the disciplinary meetings in January 2005. In my view, the failure to bring the policy to the complainant's attention makes it difficult for UBC to argue that any failure to adhere to the policy was deliberate misconduct.

[81] The content of that policy is also of significance. The policy allows for personal internet use as long as it does not interfere with the employee's job performance. There is some conflict in the evidence about whether the complainant was aware of the employer's concerns about his productivity. The complainant deposes as follows:

> At no time prior, during or after my trial period of employment, and not until January 6, 2005, did UBC or its agents express any concern with the quality or quantity of duties that I was performing, or my hours of attendance at work. I do not recall anyone from UBC prior to that date indicating that they were dissatisfied with my attendance or performance of my duties or that my performance or attendance was putting my employment in jeopardy.[82]

[82] In contrast, the Administration Manager's affidavit states that her concerns about the complainant's productivity were not resolved "by impressing upon him both in writing and verbally the importance of him completing his tasks in a timely manner (I had several verbal discussions with him about this)."[83]

[83] A review of the written communications between the Administration Manager and the complainant demonstrates that while the Administration Manager often expressed concern at the timeliness of repairs, the complainant was of the view that the problem was largely due to the delays in obtaining parts.[84] Aside from the one email on December 7, 2004, there is no documentary evidence that the Administration Manager ever told the complainant that she was concerned with his work performance. In these circumstances, I conclude it is likely that the verbal discussions referred to in her affidavit were of the same nature as the written communications.

[84] My finding in this regard is due, in part, to the fact that there are several instances where the Administration Manager's evidence is not as precise as it might have been. For example, it does not seem credible that the Log File

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[81] UBC reply submissions, para. 18.
[82] Complainant's affidavit, para. 16.
[83] Administration Manager's affidavit, para. 13.
[84] Administration Manager's affidavit, Exhibit "G".

Report was generated on December 9, 2004, as she deposes, given that the activity which is purportedly tracked involves days subsequent to that. The Administration Manager's evidence is also not as clear as it could have been regarding the timing of the incident involving a lab user, which purportedly constituted the "last straw." In light of these uncertainties involving her evidence, the evidence of the complainant that he received no verbal warnings and the lack of any documentary evidence of a warning being given to the complainant, I find that the complainant was likely not told directly by the Administration Manager that there were concerns about his work.

[85] In its reply submissions, UBC states that when the complainant was given full-time employment, the Administration Manager expressly advised him verbally that the purpose of the full-time appointment was to allow him to perform his duties in a more timely fashion".[85] The complainant's appointment to the full-time position included an increased level of responsibility and a pay raise. It is unlikely the complainant understood from this that UBC had concerns about his performance.

[86] The complainant's supervisor's evidence about his communications with the complainant is as follows:

> Over the course of the Complainant's employment, I recall sitting down informally with the Complainant on at least two occasions and speaking directly to him about my concern that he was taking too long to carry out repairs to electrical equipment in the Department. I also asked him whether there were any problems. The complainant was largely unresponsive and indicated that there were no problems.[86]

[87] The supervisor provided no details of these informal discussions. If these occurred prior to the complainant's appointment to full-time employment and increased responsibilities, then he might reasonably have thought the problems were resolved by the increase in his hours to full-time.

[88] The collective agreement which governed the complainant's employment provides, at Article 8.01

> When the University wishes to discuss dissatisfaction with the work of an employee which could reasonably lead to disciplinary action, the employee shall be accompanied by a steward.[87]

[89] There is no evidence that prior to January 2005 a shop steward was included at any meeting held to discuss dissatisfaction with the complainant's work. In any case, there is no dispute that, prior to the disciplinary meetings in

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[85] UBC reply submission, para. 2(a).
[86] Supervisor's affidavit, para. 11.
[87] UBC's initial submission, para. 8; Complainant's Affidavit, Exhibit "1".

January, 2005, the complainant was never made aware of management's specific concern that his personal internet activity may have been interfering with his productivity.

[90] I agree with UBC that reasonableness is a factor in considering whether the collection of information is necessary under s. 26(c). However, I cannot conclude that it was reasonable to initiate surreptitious surveillance of the complainant's behaviour when the employer had taken no other steps to address this issue, and there was no real evidence that alternative means of addressing the problem would have been ineffective. As a result, I find that the collection of the information regarding the complainant's internet use was not necessary to the management of the employment relationship and so the collection was not authorized under s. 26(c) of FIPPA.

[91] **3.6 Did UBC Collect the Information in Accordance With Section 27(2) of FIPPA?**—Given my finding with respect to s. 26, it is not strictly necessary to address the alternative argument put forward by the complainant under s. 27. However, because the parties have fully addressed this question, it is appropriate to make a finding regarding whether the method of collection was in conformity with the requirements of s. 27.

[92] UBC makes alternative submissions on this issue. UBC asserts that s. 27(2), which requires notice regarding the collection of information, has no application, because the information falls within the exception to s. 27(2) set out in s. 27(3)(c).[88] In the alternative, UBC submits that it complied with the requirements of s. 27(2).[89] I will first consider whether UBC was required to give notice of the collection of personal information under s. 27(2).

[93] Section 27(2) provides:

> (2) A public body must ensure that an individual from whom it collects personal information or causes personal information to be collected is told
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> (a) the purpose for collecting it,
>
> (b) the legal authority for collecting it, and
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> (c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

[94] Section 27(3)(c) provides that these notice requirements do not apply if two conditions are met: the information is not required to be directly collected

[88] UBC's initial submission, paras. 61 and 65.
[89] UBC's initial submission, para. 51.

from the individual the information is about and the information is not directly collected from that individual. UBC asserts that both conditions were fulfilled in this case.

Was the information required to be collected directly from the individual the information is about?

[95] UBC relies on both s. 27(1)(b) and s. 27(1)(c)(ii) to argue that the information which was collected did not need to be collected directly from the complainant. Section 27(1)(b) exempts from the requirement for direct collection that information which can be disclosed to a public body under ss. 33-36 of FIPPA. UBC relies on s. 33.2(c),[90] which provides that a public body may disclose personal information referred to in s. 33 inside Canada as follows:

> To an officer or employee of a public body or to a minister, if the information is necessary for the performance of the duties of the officer, employee or minister to whom the information is disclosed.

[96] Section 33 refers to personal information in the public body's custody and control. UBC's argument is that the supervisor collected the Log File Report and the GESS Reports from the complainant's computer and provided them to the Administration Manager and another employee of the UBC. This information was necessary for the carrying out of these employees' duties with respect to human resource management.[91]

[97] The complainant argues that transferring the information from one UBC employee to another, or from UBC's equipment to a UBC employee, is not a "disclosure" pursuant to s. 33.2(c) because there is no *bona fide* transfer between public bodies.[92]

[98] I find that UBC cannot rely on s. 33.2(c) and thus, s. 27(1)(b). Section 33.2(c) regulates the disclosure of information within a public body after it has been collected in accordance with FIPPA. Because that further disclosure within a public body is permissible under FIPPA, it is an exception to the requirement that information be obtained directly from the person the information is about. That does not, however, affect the requirements which lie on the public body when the information is first collected.

[99] UBC also relies on s. 27(1)(c)(ii), which exempts from the direct collection requirement information collected for the purpose of a proceeding before a court or judicial or quasi-judicial tribunal. UBC argues that whenever, exercising its managerial authority, it investigates employee misconduct, it is always with a view to relying on this information should the union decide to grieve the

[90] UBC's initial submission, paras. 58-61.
[91] UBC's initial submission, para. 60.
[92] Complainant's reply submission, para. 42.

imposition of discipline resulting from that investigation.[93] UBC notes that, in this case, the termination of the complainant's employment was in fact the subject of a grievance.[94] UBC states that the information was collected as a part of a disciplinary investigation that could reasonably be foreseen to result in litigation, and was thus collected for a proceeding before an arbitrator, a quasi-judicial tribunal.

[100] UBC relies on *Regional Municipality of Niagara*,[95] a case under Ontario's *Municipal Freedom of Information and Protection of Privacy Act*. That legislation provides that an institution can indirectly collect information if "the information is collected for the purpose of the conduct of a proceeding or a *possible* proceeding before a court or tribunal" (emphasis added).

[101] UBC acknowledges that FIPPA does not make the same reference to a "possible proceeding" but submits that "the intent is the same and that the ordinary expectation of the parties is that information collected in the course of a misconduct investigation can reasonably be expected to be used in an arbitration proceeding."[96] The complainant asserts that the language of s. 27(1)(c)(ii) necessarily implies that there exists both a dispute between the parties and a proceeding at the time of the collection of the personal information.[97] The complainant submits that it would place UBC in an awkward position if it were required to create a dispute between the parties in order to justify the collection of the information.[98] The complainant disagrees with UBC that the different wording of the Ontario statute at issue in the *Municipality of Niagara* case and the FIPPA provision have the "same intent" and that the FIPPA provision means the same thing. The complainant asserts that, indeed, the opposite is true—the ordinary meaning of s. 27(1)(c)(ii) refers only to actual proceedings at the time of collection.[99] The complainant submits that reading the word "possible" into s. 27(1)(c)(ii) "would severely undermine the section 2(d) purpose of preventing the authorized collection, use or disclosure of public bodies."[100]

[102] I find that the interpretation of s. 27(1)(c) suggested by UBC would undermine the purpose of FIPPA. By UBC's own admission, the suggested interpretation would mean that any information gathered in the investigation of employee misconduct, which might later be used in a grievance proceeding, would be exempt from the notice requirements of s. 27. I do not think this is what

[93] UBC's initial submission, para. 63.
[94] UBC's initial submission, para. 64.
[95] [2004] O.I.P.C. No. 261.
[96] UBC's initial submission, para. 69.
[97] Complainant's reply submission, para. 44, Complainant's initial submission, para. 102(e).
[98] Complainant's initial submission, para. 102(e); Complainant's reply submission, para. 48(c).
[99] Complainant's reply submission, para. 46.
[100] Complainant's reply submission, paras. 47 and 48.

was intended by s. 27(1)(c). In order to rely on that exception, the public body must be able to refer to some proceeding which was ongoing at the time that the information was collected.

Was the information directly collected from the complainant?

[103] The complainant submits that, even if the information was not required to be collected directly from the complainant, it nevertheless was directly collected in this case.[101] UBC argues that given that the information was collected without the complainant's knowledge, it cannot be said that the information was collected directly from him.[102]

[104] Information is collected directly from an individual when the disclosure to the public body occurs as a result of the individual's own activities. Information is collected indirectly when it is obtained from some source other than the individual concerned. Here, the GESS software and the Log Report were the means by which the information was recorded—they were not, however, the source of that information. The source was the complainant's own activities, which led to the recording of the information which was printed in the various reports. As a result, I find that the information was collected directly from the complainant, and that, for the reasons explained above, notice was required.

Was notice provided pursuant to s. 27(2)?

[105] UBC argues that, even if it was required to provide notice under s. 27(2), it complied with this requirement when it gave the complainant notice of its investigation in the disciplinary meetings which occurred in January, 2005.[103] Of course, this was after the information had been collected. The complainant argues that the requirement for notice set out in s. 27(2) requires "advance notice."

[106] As the complainant points out, ss. 27(3)(b)(i) and (ii) provide that the minister responsible for FIPPA may excuse compliance with the notice requirements if compliance would result in the collection of inaccurate information, or defeat the purpose or prejudice the use for which the information is collected. Notice given after collection could never result in the collection of inaccurate information.[104] This suggests that notice must be advance notice. I agree with the complainant in this regard, and find that, in order to read the provisions of FIPPA in a harmonious manner, the notice required by s. 27(2) should be interpreted as advance notice.

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[101] Complainant's initial submission, para. 85; Complainant's reply submission, paras. 38 and 39.
[102] UBC's reply submission, paras. 36-42.
[103] UBC's initial submission, para. 51 and 52.
[104] Complainant's reply submission, para. 30 and 31.

[107] For the reasons set out above, I find that the information was collected in a manner contrary to s. 27 of FIPPA.

[108] **3.7 Remedy**—The complainant asks for an order that all personal information collected by UBC in contravention of the FIPPA be destroyed. The complainant notes that this remedy is specifically contemplated by s. 58(3)(f) of FIPPA.[105] The complainant recognizes that the effect of this order would be to limit the evidence available to UBC on the hearing of the complainant's termination grievance. The complainant argues:

> While remedying the direct harm done to the Complainant – the loss of employment based on the information – is not available to the Commissioner under s. 58(3), the Commissioner can, by an unflinching application of section 58(3)(f), destroy all direct and derivative records containing the wrongfully collected personal information, and therefore position the complainant to possibly, although not necessarily, be reinstated to his employment at Arbitration.[106]

[109] The complainant argues that this order would have a desirable deterrent effect, both with respect to UBC and other public bodies.[107] The complainant submits that any prejudice which UBC may ultimately suffer at arbitration is a function of its breach of FIPPA and not any order granted under FIPPA.[108]

[110] UBC argues that an order for destruction of the records would be an unprecedented and extraordinary remedy that should not be ordered for a variety of reasons.[109] UBC asserts that it acted at all times in good faith, and reasonably and honestly believed that forewarning the complainant of its investigation would render its efforts ineffectual.[110] UBC argues that s. 3(2) of FIPPA provides that FIPPA does not limit the information available by law to a party to a proceeding. UBC argues that, as a result, the Commissioner does not have the jurisdiction to order that the records be destroyed.[111] UBC asserts that it has reviewed the jurisprudence in British Columbia, Alberta, Saskatchewan and Ontario and has not found a single case in which destruction of records was ordered.[112] In its submission in this inquiry, UBC refers to various Ontario cases where improperly collection information was not ordered destroyed.[113] In response, the complainant asserts that the Ontario legislation does not explicitly provide for destruction as a remedy.[114]

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[105] Complainant's reply submission, para. 53(a).
[106] Complainant's initial submission, para. 106.
[107] Complainant's initial submission, para. 107.
[108] Complainant's reply submission, para. 59.
[109] UBC's initial submissions para. 71 and 81.
[110] UBC's initial submission, para. 73.
[111] UBC's initial submission, para. 78.
[112] UBC's initial submission, para. 72.
[113] UBC's initial submission, paras. 84-87.
[114] Complainant's reply submission, para. 53(d).

[111] As noted above, UBC has already applied to a labour arbitrator for an interim order compelling it to preserve certain documentary evidence in its control and possession for use in the termination grievance. As also noted above, counsel for the complainant objected to UBC's counsel writing to inform this Office of the fact that the arbitrator would make a determination on the preliminary issue of the production of documents. At the same time, the complainant's counsel objected to the suggestion by UBC's counsel that this Office "hold off issuing a decision in this matter" until the arbitrator rendered his decision. Counsel for the complainant requested an opportunity to make submissions on the question of holding the matter in abeyance if such a manner of proceeding were contemplated.

[112] This Office did not put the matter into abeyance as a result of UBC's letter, and so no submissions were sought from the parties on that issue. Counsel for the complainant did not seek to make any additional representations, although he noted in his November 22, 2006 letter that it was the complainant's position that correspondence relating to the arbitrator's decision, and the decision itself, should not form part of the record before me. I find, however, that it is appropriate that I consider the arbitrator's decision.

[113] In his decision on the application, Arbitrator Hope ordered that the records be produced at the hearing of the grievance. No ruling was made on the records' admissibility. In making his ruling, Arbitrator Hope stated:

> In my view, where there are puisne adjudicators who occupy jurisdictions that have the potential to compete, the appropriate course is for each adjudicator, (or adjudicative tribunal), to exercise its jurisdiction without regard for the competing jurisdiction. In that way, any dispute can be referred to a superior adjudicative body that has the jurisdiction to resolve the issue.
>
> On that understanding, I repeat that I am required to grant what is otherwise a routine application falling comfortably within my jurisdiction on the basis that the documentary evidence in question meets the test of notional relevance and that it is not necessary at this preliminary stage to address the broader question of its admissibility in the particular circumstances. In that resolution, it is left to the Privacy Commissioner to exercise what he views as his jurisdiction to determine whether the documentary evidence in question was collected in breach of the Act and, if so, what remedy is appropriate. In that way, either party is free to appeal his Decision or mine and thus place the jurisdictional issue before a tribunal having the jurisdiction to resolve it.

[114] I do not agree with UBC that s. 3(2) of FIPPA means that I have no jurisdiction to order the records destroyed under s. 58(3)(f). I also note that Ontario's Information and Privacy Commissioner has recently issued an order

requiring the destruction of documents under the *Municipal Freedom of Information and Protection of Privacy Act*.[115] The PEI Information and Privacy Commissioner has also issued an order requiring the destruction of documents improperly collected, in that case in the context of an employment investigation.[116]

[115] It would seriously undermine the important objectives of FIPPA if public bodies were free to use, with impunity, information collected in contravention of the law. Normally, it would be appropriate in these circumstances to either order the destruction of those records, or parts of them, which contain the illegally obtained information or, in the alternative, order UBC to refrain from making any use of them. The question raised in this case is whether I should exercise my discretion to issue such an order given the existence of an order by an arbitrator that UBC produce the records in question at the grievance hearing.

[116] The order requested by the complainant, namely, destruction of the records, would serve two purposes. First, there would be the immediate effect of ensuring that the evidence contained in the records under dispute is not available to UBC for the purposes of defending the grievance. The second, related, purpose would be to deter UBC from engaging in this kind of unauthorized collection of information in the future.

[117] I find that the second purpose can be served by issuing an order under s. 58(3)(e) that UBC stop collecting, using or disclosing personal information in contravention of FIPPA. In this regard, UBC is required to stop collecting information through an examination of log file reports, or the use of spyware, to track its employees' internet use, when there are available to UBC less intrusive steps to address employee internet activity. In addition, if UBC intends to use such tracking methods in the future in cases where it is truly necessary to do so, it should provide adequate notice of this intention to its employees.

[118] With respect to the first purpose, namely, ensuring that UBC does not benefit from its improper collection of information, I note that if I were to issue the order requested by the complainant, UBC would be faced with the conflicting decisions of two tribunals. This would appear to be a true operational conflict—UBC would not be able to comply with both my order for destruction of the documents and Arbitrator Hope's order that the documents be produced at the grievance hearing. If that occurred, the conflict would have to be resolved by a court on the basis of the principles expressed by the Supreme Court of Canada in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*[117]

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[115] Order MO-2225.
[116] Order No. PP-06-001.
[117] [1995] 2 S.C.R. 739 ("*B.C.Tel*").

[119] In that case, the Court held that in determining which of two conflicting decisions of administrative tribunals should take precedence, a court should have regard to three factors. The first factor involves the legislative purpose behind the establishment of each administrative tribunal. The Court stated:

> For example, human rights legislation is considered quasi-constitutional. Consequently, all other factors being equal, decisions of human rights tribunals would generally take precedence over conflicting decisions based on other, less fundamental, administrative schemes.[118]

[120] In this regard, I note that the privacy rights of Canadians, such as those protected by FIPPA, are fundamental rights. As the Ontario Court of Appeal recently noted:

> The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and of the treatment of that right by the courts. The Supreme Court of Canada has characterized the federal *Privacy Act* as quasi-constitutional because of the critical role that privacy plays in the preservation of a free and democratic society. In *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras. 30-31) In *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the *Charter*, and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66, 71).[119]

[121] The second relevant factor is the extent to which the decision is fundamental to the purpose of the tribunal. The third relevant factor is the degree to which an administrative tribunal, in reaching a decision, is fulfilling a policy-making or policy implementation role.[120]

[122] With respect to the second factor, it would appear that determining what evidence is admissible at a grievance hearing is more central to the purpose of an arbitrator's functions than that of this Office. However, there can be no doubt that if this Office were to issue an order requiring the destruction of documents, it would be in the implementation of privacy policy.

[123] I find that in this case it is neither necessary nor desirable to subject UBC to conflicting decisions. Where possible, tribunals should exercise their

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[118] *B.C.Tel* at para. 56.
[119] *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 at para. 29.
[120] *BC Tel* at paras. 57 and 58.

discretion in a manner which allows the fullest possible scope to the authority of each decision maker. I note that in *Re Greater Vancouver Regional District and G.V.R.D.E.U.*, a case relied upon by UBC, Arbitrator McPhillips stated

> If, upon hearing the evidence, I am satisfied that there has been an invasion of privacy in circumstances which were unreasonable, I would not then hesitate to rule the evidence inadmissible.[121]

[124] In that case, there was no finding made by a separate tribunal that the employees' rights under the *Privacy Act* were breached by the employer's actions, and the arbitrator was required to determine the privacy breach.

[125] In this case, I have already made the determination that the records at issue contain information which was obtained in contravention of UBC's legal obligations under FIPPA. This contravention was two-fold. First, pursuant to s. 26 of FIPPA, UBC is prohibited from collecting personal information unless it is authorized to do so under that provision. I have found that s. 26 does not provide authority for the collection of the information at issue in the circumstances of this case. Therefore, the collection of the information was contrary to UBC's statutory obligations. I have also found that the manner of collection was contrary to FIPPA's requirements. Therefore, both the collection itself and the manner of collection were contrary to law. The Arbitrator will no doubt be provided with this ruling when he is asked to determine the records' admissibility in the grievance hearing.

[126] The complainant's submission makes it clear that the purpose of seeking the destruction of the documents is to preclude their use at the grievance hearing. However, the question of whether the records are admissible in the grievance hearing is a matter which is squarely within the authority of an arbitrator. I am satisfied that the arbitrator will take into account the fact that the information was collected contrary to law, and the importance of FIPPA's objectives, in making the determination regarding admissibility. If the Arbitrator holds that the records are not admissible, the first purpose of the requested destruction order outlined above will be equally well-served without subjecting UBC to conflicting decisions.

[127] In this case, the complainant asks for an order that:

> (a) Records 470070-470486, consisting of the Log File Report and GESS Reports, be destroyed in their entirety;
>
> (b) Any Record contained within Records 470001-470069 that contains information derived from pages 470070-470486 be destroyed in its entirety or, in the alternative, redacted of that information that was collected in contravention of the act.

[121] (1996) 57 L.A.C. (4th) 113.

(c) UBC be required to ensure that any electronic records created by the operation of the GESS spyware on the complainant's computer be erased.

(d) I remain seized of this matter to settle any disputes that may arise regarding whether particular information was derived from the wholly impugned records.

[128] In this case, I decline to exercise my remedial discretion under FIPPA in a manner which could have the effect of interfering with the ability of the Arbitrator to determine the issue of the admissibility of the documents in the grievance arbitration. However, I will order that UBC is prohibited from utilizing any of the personal information collected in contravention of FIPPA as described above, other than as required in order to:

1. Comply with the order of Arbitrator Hope dated March 20, 2007;

2. Enable Arbitrator Hope, or any other arbitrator presiding over the complainant's termination grievance, to make a determination regarding the admissibility of any documents in the grievance hearing; and

3. Give effect to any order which Arbitrator Hope, or any other arbitrator presiding over the complainant's termination grievance, may make with respect to the use of documents at the grievance hearing.

4.0 CONCLUSION

[129] For the reasons given above, under s. 58(3) of FIPPA, I make the following orders:

1. UBC is required to immediately stop collecting information through an examination of log file reports, or the use of spyware, to track its employees' internet use when there are available to UBC less intrusive steps to address employee internet activity under UBC's current policy respecting internet;

2. UBC is prohibited from making any use of Records 470070-470486, other than as required in order to (a) comply with the order of Arbitrator Hope, dated March 20, 2007; (b) enable Arbitrator Hope, or any other arbitrator presiding over the complainant's termination grievance, to make a determination regarding the admissibility of any documents in the grievance hearing, and (c) give effect to any order which Arbitrator Hope, or any other arbitrator presiding over the complainant's termination grievance, may make with respect to the use of documents at the grievance hearing.

3. UBC is prohibited from making any use of any Record or part of a Record contained within Records 470001-470069 that contains information derived from pages 470070-470486, other than as required in order to (a) comply with the order of Arbitrator Hope, dated March 20, 2007; (b) enable Arbitrator Hope, or any other arbitrator presiding over the complainant's termination grievance, to make a determination regarding the admissibility of any documents in the grievance hearing, and (c) give effect to any order which Arbitrator Hope or any other arbitrator presiding over the complainant's termination grievance, may make with respect to the use of documents at the grievance hearing.

4. If the parties cannot agree on what Records or parts of Records contained within Records 470001-470069 contain information derived from pages 470070-470486, the parties will, within 30 days of receiving this order, provide me with their submissions on that issue.

5. UBC is required to ensure that any electronic records created by the operation of the GESS software on the complainant's computer be erased.

September 24, 2007

ORIGINAL SIGNED BY

Catherine Boies Parker
Adjudicator

OIPC File No. FO5-26107