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Watch Out! An Update about Surveillance under PIPEDA: Draft Surveillance Guidelines

by: Patricia J. Forte

The general rule of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* is that individuals must consent to the collection, use and disclosure of their personal information.

There are certain situations where personal information like video surveillance can be collected, used or disclosed without consent, such as where:

- (a) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information; and
- (b) the collection of the information is reasonable for purposes related to investigating a breach of an agreement or a contravention of a law of Canada or a Province.

According to decisions of the Office of the Privacy Commissioner ("OPC"), the following conditions must be met to rely on one of the above exceptions to justify surveillance:

- (a) the collection of personal information must only be for purposes that a reasonable person would consider appropriate in the circumstances:
 - (i) Was it reasonable in all the circumstances to undertake surveillance of the individual?
 - (ii) Was the surveillance conducted in a reasonable way, which is not unduly intrusive and which corresponds fairly with acquiring information pertinent to the organization's legitimate interests?
- (b) There must be substantial evidence to support the suspicion that a relationship of trust has been broken or a law contravened (i.e. to determine whether the insured was displaying behaviour inconsistent with her condition).
- (c) The organization must have exhausted all other means of collecting the information in less privacy-invasive ways.
- (d) The collection must be limited to the purposes as much as possible.
- (e) An investigation firm must not collect more information than it needs to fulfill the specific purposes identified at the outset of the investigation.

Draft Surveillance Guidelines

In the Fall 2008, the OPC sought public consultation on a draft guideline¹ about the conduct of covert video surveillance intended to apply to insurers and employers. The guideline was developed based on the premise that video surveillance technology is "inherently intrusive". Several aspects of the guideline are controversial.

Industry groups, including have made submissions opposing aspects of the draft guideline.

While the proposed guideline is not yet in force, the guideline serves to show how the OPC *may* address a privacy complaint in the future. In addition to incorporating the above-referenced test, the draft guideline also requires:

- The decision to undertake covert surveillance should be made at a very senior level of the organization.
- There should be a documented record of every decision to undertake video surveillance, its progress and outcome.
- Organizations should have a general policy that guides the decision making process and in carrying out covert surveillance in the most privacy-sensitive way possible.
- Organizations should enter into a service agreement with the private investigation agency that incorporates the principals of the guideline about the collection, use and disclosure of surveillance and the way surveillance is approached and conducted.
- The collection of images of third parties should be avoided, or if captured, be deleted or masked by the use of "blurring technology".

The requirement for editing the video or using "blurring technology" to remove reference to third parties is troublesome. From an evidentiary perspective, courts demand that the original, unaltered videotape be available for use at trial without unnecessary stops and starts. The OPC suggests doing those things to avoid capturing the images of innocent third parties.

It is premature to say whether the draft guideline will survive intact, or whether the OPC will be persuaded by the arguments of industry stakeholders. In the meantime, insurers should pause to consider whether they want to be proactive by incorporating even some of the draft guideline provisions as best practices in conducting surveillance.

¹ "Guidance on Covert Video Surveillance in the Private Sector". The draft guideline is no longer published on the Privacy Commissioner's website. However, a version of it appears on the website of the Canadian Association of Private Investigators at <http://www.capicanada.ca/pdfs/OPC.2008.11.21.Part%201.A.Sept%20Guidelines.pdf>

**Patricia Forte is a Partner with
Miller Thomson's Waterloo**

295 Hagey Blvd., Suite 300
Waterloo, ON N2L 6R5
519.579.3660
www.millerthomson.com

