FTR Now

Covert Surveillance Guidelines for Federally Regulated Employers

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On May 27, 2009 the Office of the Privacy Commissioner of Canada issued an *OPC Guideline Document*: “Guidance on Covert Video Surveillance in the Private Sector”. The Guideline Document outlines the Commissioner’s recommendations to private sector organizations engaging in covert surveillance in the course of commercial activity, as well as to federally regulated employers engaging in covert surveillance with respect to their employees. These activities are governed by the *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”), which the Commissioner is responsible for enforcing.

The Commissioner applies a fairly stringent test in order to justify the undertaking of covert surveillance, and identifies four factors to be considered when determining whether it is appropriate:

- First, the organization must have a strong basis to support the use of covert video surveillance, and not a mere suspicion.
- Second, the surveillance must be clearly related to a legitimate business purpose, and there should be a strong likelihood that the surveillance will help achieve the purpose.
- Third, an organization should first weigh whether the loss of privacy is proportional to the benefit gained.
- Fourth, an organization should also first consider whether other less “privacy” invasive means of collecting the personal information would be more appropriate prior to engaging in covert surveillance.

The Guideline Document notes that consent is normally required when engaging in covert surveillance. According to the Commissioner, consent may be implied in certain cases, such as when an individual has initiated legal action and such surveillance is necessary to defend the action. The Guideline Document further notes that, in many cases, covert surveillance will be conducted without consent and that, in such cases, the organization must justify the surveillance under one or more of the statutory exceptions to *PIPEDA*’s consent requirement.

The Guideline Document also provides recommendations on documenting covert surveillance and developing a covert surveillance policy, and also provides recommended steps when engaging private investigation companies to engage in covert surveillance.

Federally regulated employers, such as banks and inter-provincial transportation companies, as well as provincial companies which engage in covert surveillance in relation to their commercial activities are advised to review the Guideline Document on the Commissioner’s website.

While the guidelines are not legally binding, they provide some insight into how the Commissioner may adjudicate in cases involving covert surveillance.

For more information, please feel free to contact any member of the firm’s Information and Privacy Group.

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